SUBMITTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted]316

S. H. DAVIS, J. A. WHITE, AND ANNIE WHITE,
PLAINTIFFS IN ERROR,

vs.

ALICE WILLIFORD, ALLIE GRIFFIN, ROSIE WILLIFORD,
ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED MARCH 16, 1925

(30,957)

(30,957)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 992

S. H. DAVIS, J. A. WHITE, AND ANNIE WHITE, PLAINTIFFS IN ERROR,

vs.

ALICE WILLIFORD, ALLIE GRIFFIN, ROSIE WILLIFORD, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 7, 1925

[fol. a] **IN SUPREME COURT OF OKLAHOMA**

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, Oklahoma, this the 11th day of March, 1925.

Wm. M. Franklin, Clerk of Supreme Court of Oklahoma, by Reuel Haskell, Jr., Assistant. (Seal Supreme Court, State of Oklahoma.)

[fol. 1] CITATION—In usual form, showing service on Geo. E. Rider; filed March 5, 1925; omitted in printing

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[fol. 2] IN SUPREME COURT OF OKLAHOMA

No. 14762

ALICE WILLIFORD, ANNIE GRIFFIN, ROSIE WILLIFORD, MILLIE McLISH, and GEO. E. RIDER, Plaintiffs in Error,

versus

S. H. DAVIS, J. A. WHITE, and ANNIE WHITE, Defendants in Error

PETITION FOR WRIT OF ERROR—Filed March 5, 1925

Come now S. H. Davis, J. A. White and Annie White, the defendants in error in the above entitled cause, and, considering and feeling themselves aggrieved by the final decision of the Supreme Court of the State of Oklahoma in rendering its final judgment or decree against them in said cause, files herewith assignments of error, hereby referring thereto and making the same a part hereof, the same as if fully set forth and copied herein, and pray that a writ of error from the said decision and judgment or decree may issue in its behalf out of the Supreme Court of the United States for the correction of the errors, an assignment whereof is filed with this petition, and that a transcript of the record, proceedings, files and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

And these defendants in error pray for the allowance of a citation in due form of law; and for an order fixing the amount of the supersedeas bond.

McQueen & Kidd, Attorneys for Petitioners, S. H. Davis, J. A. White, and Annie White, Defendants in Error.

[fol. 3] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed March 5, 1925

Come now S. H. Davis, J. A. White and Annie White, defendants in error in the above entitled cause, the said S. H. Davis having been the plaintiff in the District Court of Love County, State of Oklahoma, and the said J. A. White, Annie White, Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and Geo. E. Rider, having been the defendants in said District Court, and file herewith their petition for writ of error in connection with their assignments of error, and say, aver and show, as follows:

That there are errors in the record and proceedings in and of said cause and that there are manifest errors in the actions, doings, rulings, judgments, decrees and opinion of the Supreme Court of the State of Oklahoma and, for the purpose of having same reviewed in and by the Supreme Court of the United States, said defendants in error hereby make and file the following assignments of error on which they are relying upon their prosecution of a writ of error in the above entitled suit or cause, as are more fully and particularly set forth as follows:

1. That on the 7th day of October, 1924, the Supreme Court of the State of Oklahoma rendered a judgment herein in favor of the plaintiffs in error and against the defendants in error, and each of them, and that, after the rendition of said judgment, and in pursuance of the rules of the Supreme Court of the State of Oklahoma, these defendants in error, within the time allowed by the rules and orders of said court, filed a petition for rehearing; and that, thereafter, and on the 7th day of January, 1925, an order was made by this court denying said petition for rehearing; that an opinion was filed in this cause by this court reversing the judgment of the District Court of Love County, State of Oklahoma, which opinion is a part of the record in this case. And the said defendants in error, your petitioners herein, further respectfully show that the said Supreme Court of the State of Oklahoma is the highest court of the State of Oklahoma in which a decision in said cause could be had and that said cause should be removed to the Supreme Court of the United States by writ of error, under the Statutes of the United States authorizing writs of error to [fol. 4] said court, inasmuch as in said judgment of the Supreme Court of the State of Oklahoma, and the proceedings in said cause, certain errors were committed, to the prejudice of these defendants in error, all of which will more, in detail, appear as hereinafter set forth.

2. That there was drawn in question in said judgment and opinion of the Supreme Court of the State of Oklahoma the validity of

a Statute of the United States and the decision was against the validity of said statute in this that there was drawn in question the validity of an Act of Congress, approved April 26, 1906 (34 Stat. L, 137), and more particularly section 23 of said Act of Congress, which said section of said Act of Congress is as follows:

"Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner."

That the record, proceedings, judgment and opinion of the Supreme Court of the State of Oklahoma show that there was allotted to one Frazier McLish, a full-blood Chickasaw Indian, duly enrolled as such, as a portion of his pro rata share of the lands of the Choctaw and Chickasaw Tribe of Indians, in the Indian Territory, certain lands; that the said Frazier McLish, prior to his death and in 1906, and subsequent to the Act of Congress of April 26, 1906 (34 Stat. L. 137), made a last will and testament in which said last will and testament a portion of the lands so allotted to him were devised to one Julia Kemp, a sister of the said Frazier McLish, who upon the death of the said Frazier McLish became and was the owner of and in the possession of said lands and from whom title to said land was derived by the defendants in error, J. A. White and Annie White, his wife; that the said J. A. White went into the possession of said lands in 1907 and has been in the possession thereof and is now in the possession of said lands since said date; that in 1920 the said J. A. White and Annie White, his wife, executed certain mortgages to the said S. H. Davis and that this action was originally instituted in the District Court of Love County, Oklahoma, for the purpose of foreclosing the second mortgage on a portion of the allotted lands of the said Frazier McLish, deceased.

That Millie McLish was the surviving wife of the said Frazier McLish, deceased, and that the said Alice Williford, Allie Griffin, Rosie Williford were the children of the said Frazier and Millie McLish, and that Geo. E. Rider claimed an interest in said land by virtue of a contract with the said surviving wife and children of the said Frazier McLish, deceased.

Your petitioners further show that it appears from the record that the said Frazier McLish, deceased, did in fact appear before the Hon- [fol. 5] orable Thomas N. Robnett, on the 9th day of July, 1906, he being then a United States Commissioner, for the Southern District, in the Indian Territory; that the said Frazier McLish did, in fact, acknowledge the will to be his will but that the said Thomas N. Robnett did not place on said will any certificate of acknowledgment and that said opinion and judgment of the Supreme Court of the State of Oklahoma holds that a true and proper construction of the

said Act of Congress of April 26, 1906, Section 23, 34 Stat. L. 137, was that the United States Commissioner, or a Judge of the United States Court, as in said act provided, must necessarily have placed upon said will a certificate of acknowledgment at the time the testator appeared before such officer and that a lack of such certificate of acknowledgment rendered the will invalid to pass title to any real estate, to the exclusion of the wife and children of such full-blood testator.

3. That the Supreme Court of the State of Oklahoma erred in holding and deciding that a certificate of acknowledgment was essential to the validity of a will of a full-blood Indian testator, devising any part of his real estate to the exclusion of his wife and children.

4. That the Supreme Court of the State of Oklahoma erred in holding and deciding that the testimony of the said Honorable Thomas N. Robnett, United States Commissioner at the time such will was in fact acknowledged, in the trial of this cause in the District Court of Love County, State of Oklahoma, was not a sufficient compliance with section 23 of the Act of Congress of April 26, 1906, 34 Stat. L. 137.

5. That the Supreme Court of the State of Oklahoma erred in holding that the purported devise by the said Frazier McLish, deceased, to his sister, Julia Kemp, was invalid and void and passed no title to the land sought to be foreclosed, in the action instituted in the District Court of Love County, Oklahoma.

6. That the Supreme Court of the State of Oklahoma erred in refusing to affirm the judgment or decree of the District Court of Love County, Oklahoma, which was in favor of your petitioners.

7. That the Supreme Court of the State of Oklahoma erred in reversing the judgment and decree of the District Court of Love County, Oklahoma, which said judgment, or decree was in favor of your petitioners.

8. That the Supreme Court of the State of Oklahoma erred in denying the petition for rehearing duly filed and presented before said Supreme Court of Oklahoma by these defendants in error.

Wherefore, for these and other manifest errors appearing in the record, the said S. H. Davis, J. A. White and Annie White pray that the judgment of the Supreme Court of the State of Oklahoma be reversed, set aside and held for naught and that judgment be rendered for these petitioners granting and rendering unto them their rights under the Constitution, laws and treaties of the United States; and said petitioners also pray for judgment for their costs.

McQueen & Kidd, Attorneys for Petitioners.

STATE OF OKLAHOMA, ss:

[fol. 6] IN SUPREME COURT OF OKLAHOMA

ORDER ALLOWING WRIT OF ERROR—Filed March 5, 1925

Let the writ of error issue, upon the execution of, a bond by the defendants in error to the plaintiffs in error, in the sum of $1,000.00 *Dollars*, conditioned as provided by law, such bond, when so approved, to operate as a supersedeas bond.

Dated this 5th day of March, 1925.

Geo. M. Nicholson, Chief Justice of the Supreme Court of the State of Oklahoma.

Attest: Wm. M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, by Reuel Haskell, Jr., Assistant. (Seal Supreme Court of Oklahoma.)

[File endorsement omitted.]

[fol. 7] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PRAECIPE FOR TRANSCRIPT—Filed March 5, 1925

To the Honorable William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma:

You will please prepare a transcript and certified copy of the proceedings and of the entire record in the above entitled cause, for use on writ of error, for and in behalf of the above named defendants in error, S. H. Davis, J. A. White and Annie White, for the purpose of taking the above entitled cause to the Supreme Court of the United States for review by that court.

Dated this 5th day of March, 1925.

McQueen & Kidd, Attorneys for Defendants in Error, S. H. Davis, J. A. White, and Annie White.

[fol. 8] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

WRIT OF ERROR—Filed March 5, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges and Clerk of the Supreme Court of the State of Oklahoma. Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said Court before you, or some of you, being the highest Court of law or equity in said State in which a decision could be had in said suit between Alice Williford, et al., plaintiffs in error, and S. H. Davis, et al., Defendants in error, in the Supreme Court of said State, wherein a judgment was rendered in said Court on the 7th day of October, 1924, in favor of said plaintiffs in error and against the defendants in error; and wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the laws of the United States, and the decision was against their validity; and wherein was drawn in question the validity of a statute of, or an authority exercised under the laws of said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; and it therein appears that manifest error hath happened, to the great damage of said plaintiffs in error, as by his complaint, petition and assignment of errors appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington, D. C. within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

[fol. 9] Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this the 5th day of March, 1925.

Harry L. Finley, Clerk United States District Court for the Western District of Oklahoma.

Approved and allowed by the Honorable George L. Nicholson, Chief Justice of the Supreme Court of the State of Oklahoma, this 5th day of March, 1925.

Geo. M. Nicholson, Chief Justice of the Supreme Court of the State of Oklahoma.

Attest: Wm. M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, by Reuel Haskell, Jr., Assistant. (Seal Supreme Court of Oklahoma.)

[fols. 10-12] BOND ON WRIT OF ERROR FOR $1,000—Approved and filed March 5, 1925; omitted in printing

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[fol. 13] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION—Filed October 8, 1923

The said Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and Geo. E. Rider, Plaintiffs in Error, complain of said Defendants in Error, for that the said S. H. Davis, J. A. White and Annie White, at the March, 1923, term of the district court of Love County, State of Oklahoma, recovered a judgment by the consideration of said court against the said Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and Geo. E. Rider, in a certain action then pending in said court wherein S. H. Davis was plaintiff and the said J. A. White, Annie White, his wife, Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and Geo. E. Rider were defendants. The original case-made, duly certified and attested, is hereunto attached, marked Exhibit A, and made a part of this Petition in Error; and the said Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and Geo. E. Rider, aver that there is error in the said record and proceedings, in this, to-wit:

[fol. 14] 1. Said court erred in overruling the Motion of Plaintiffs in Error for a new trial.

2. Said court erred in admitting evidence on the part of the Defendants in Error.

3. Said court erred in refusing and ruling out competent and legal evidence on the part of the Plaintiffs in Error.

4. Said court erred in finding and concluding that the will of Frazier McLish was executed, acknowledged and approved in the manner and form required by law.

5. Said court erred in finding and concluding that if said will was executed, acknowledged and approved in accordance with law that Millie McLish, the widow of said decedent, was not entitled to dower in the lands of her deceased husband Frazier McLish, under the laws of Arkansas which were in force at the time of his death.

Wherefore, Plaintiffs in Error pray that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the Plaintiffs in Error and against the Defendants in Error, and that the Plaintiffs in Error be restored to all rights that they have lost by the rendition of such judgment, and for such other relief as to the court may seem just.

Geo. E. Rider, Attorney for Plaintiffs in Error.

[fols. 15-18] EXHIBIT "A." CASE MADE—Filed in Supreme Court October 8, 1923

[Title omitted]

APPEARANCES OF COUNSEL

T. B. Wilkins, Marietta, Oklahoma, Attorney for the Plaintiff.

A. Edleman, Ardmore, Oklahoma, Attorney for J. A. and Annie White.

Geo. F. Rider, Madill, Oklahoma, Attorney for Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and himself.

[fol. 19] IN DISTRICT COURT OF LOVE COUNTY, OKLAHOMA

No. 1729

S. H. DAVIS, Plaintiff,

vs.

J. A. WHITE, ANNIE WHITE, His Wife; ALICE WILLIFORD, ALLIE GRIFFIN, ROSIE WILLIFORD, MILLIE MCLISH, and GEO. F. RIDER, Defendants.

CAPTION

This case was commenced in the District Court of Love County, Oklahoma, on the 5th day of May, 1922, when the plaintiff, S. H. Davis filed in said Court his petition against the defendants, J. A. White and wife, Annie White, Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and Geo. F. Rider, which said petition appears in words and figures following:

[fol. 20] IN DISTRICT COURT OF LOVE COUNTY

[Title omitted]

PETITION TO FORECLOSE MORTGAGE—Filed May 5, 1922

Plaintiff states, that the defendants, J. A. White and Annie White, his wife, are residents of the County of Love and State of Oklahoma.

that the defendants, Alice Williford, Allie Griffin, Rosie Williford, and Millie McLish are residents of Johnson County; defendant George F. Rider, is a resident of Marshall County, Oklahoma.

I

Plaintiff states that on or about the 24th day of January, 1920, the defendants, J. A. White and Annie White, his wife, for a valuable consideration to them paid, made, executed and delivered to this plaintiff, their certain promissory note, in writing, of that date, where y they promised, for value received, to pay him or order at the Commercial National Bank in Kansas City, Kansas, with exchange on New York, on the 1st day of February, 1921, after date, the sum of $120.00, with interest thereon at the rate of 10% per annum from mautrity, and if interest not paid when due it shall become as principal and bear interest from its maturity at the rate [fol. 21] of 10% per annum payabl- annually.

It is further provided by said note, that if this note is placed in the hands of an Attorney for collection, I hereby agree to pay a reasonable sum, which shall be not less than 10% of its principal and accrued interest as Attorneys' fee, whether it is decreed in judgment or not: that said note has been placed in the hands of the Attorney herein for collection, and fee has thereby accrued.

Plaintiff is now the owner and holder of said note, a copy of which with all endorsements thereon is filled herewith, made a part of this petition and marked Exhibit "A".

II

Plaintiff for further cause of action against the defendants states, that heretofore, to-wit, on or about the 24th day of January, 1920, the defendants, J. A. White and Annie White, his wife, for value received, made, executed and delivered to this plaintiff their certain promissory note in writing of that date whereby they promised for value received, to pay this plaintiff the sum of $120, on the 1st day of February, 1922, after date, together with interest thereon at the rate of 10% per annum from maturity, interest payable annually, and if interest be not paid when due, to become as principal and bear interest from maturity at the rate of 10% per annum.

It is further provided by said note, that if this note is placed in the hands of an Attorney for collection, I hereby agree to pay a reasona'le sum, which shall be not less than 10% of its principal and accrued interest as Attorneys' fee, whether it is decreed in Judgment or not: that said note has been placed in the hands of the Attorney herein, for collection and said fee has thereby ac—

[fol. 22] Plaintiff is now the owner and holder of said note, a copy of which, with all endorsements thereon is attached hereto, marked Exhibit "B" made a part of this petition and filed herewith.

III

Plaintiff for third cause of action against the defendants, refers to the first and second counts of this petition, makes the same a part of this count, as full as if set out herein and pleaded, and states, that at the same time and place, and as a part of the same transaction, and for the purpose of securing the payment of the indebtedness set out in the prior counts of this petition, the defendants, J. A. White and Annie White, his wife, made, executed and delivered to this plaintiff their certain mortgage deed, in writing, whereby they conveyed to him, the said S. H. Davis, the following described real estate, situated in Love County, Oklahoma, to-wit:

The Northeast Quarter of the Northeast Quarter of the Northeast Quarter and the South half of the North half of the Northeast Quarter and the North half of the South half of the Northeast Quarter of Section 1, Township 9 South, Range 1 East.

That said mortgage was duly acknowledged in accordance with the laws of the State of Oklahoma, on or about the 30th day of January, 1920, and filed for record in the office of the County Clerk of Love County, Oklahoma, on or about the 31st day of January, 1920, and is there recorded in Book 15, page 590 in the records of said office.

That the said defendants, J. A. White and Annie White, or one of them was the owner of said premises and in possession thereof. [fol. 23] That by the terms of said mortgage, appraisement and all benefit of exemption and stay laws in the State of Oklahoma were expressly waived and said mortgage has endorsed thereon the words "Appraisement Waived," a copy of which said mortgage, with all endorsements thereon is filed herewith, marked Exhibit "C" and made a part of this petition.

Plaintiff further says, that the said mortgage was subject to a prior mortgage securing an indebtedness of $2,400.00 on said premises and payable to the plaintiff, S. H. Davis.

Plaintiff states, that said mortgage was conditioned that if the makers thereof, the defendants, J. A. White and Annie White, or any one for them should pay said indebtedness, principal and interest, as and when the same became due, according to the true tenor and effect of said notes, and should perform all the conditions therein contained, then this conveyance to be void, and said premises released at the request of the makers thereof, but in case of default in the payment of said notes, or any of them, or any part of the same, or any interest thereon, as and when the same became due and payable, or if the makers thereof should fail to pay any taxes which — according to law, then the whole of said indebtedness should become due and payable, at the option of the legal holder thereof, without notice to the maker thereof, and in case of such default, said note should bear interest at the rate of 10% per annum.

Plaintiff further states that the conditions of said mortgage have been broken by reason of the defendants, or any one for them, failing to pay the note for $120.00 described in the first count of this petition, falling due on the 1st day of February, 1921, and that

[fol. 24] the same remains due and unpaid, with interest thereon from the 1st day of February, 1921, at the rate of 10% per annum, to which should be added 10% of said total amount as attorneys' fees.

Plaintiff says, that the conditions of said mortgage have been further broken by reason of the failure of said defendants, or any one for them to pay the note falling due on the 1st day of February, 1922, described in the second count of this petition: that the same remains due and unpaid with interest thereon at the rate of 10% per annum from its said due date, to which should be added 10% of the total amount thereof as Attorneys' fees, due this plaintiff's Attorney.

Plaintiff further says that it was agreed in and by said mortgage, that the said defendants would pay the taxes on said premises before the same became delinquent, and that the taxes for 1919, 1920 and 1921, remain due and unpaid, and that said premises have been sold for taxes for the years 1919 and 1920, by reason of failure of the said defendants to pay the same and by reason of their default and failure to comply with their promises and agreements in said mortgage and notes hereinabove described.

Plaintiff further alleges and states, that the notes described in the above mortgage given this plaintiff are the same notes described *the* the said mortgage and notes here described in the first and second counts of this petition.

Said mortgage further provides and it was agreed in and by said mortgage, that in case of default of the defendants, J. A. White and Annie White, his wife, or if any one for them fail to comply with any of the provisions of said notes and mortgage securing the same, [fol. 25] this plaintiff should be entitled to recover of an against said defendants a reasonable Attorneys' feet of $35.00 to be secured by said mortgage.

This plaintiff fu-ther alleges that the said amount of $35.00 is a reasonable fee in the premises.

It is further agreed in an- by said mortgage, that in case of default, of the defendants, of any condition or conditions in the note or mortgage, plaintiff should be entitled to immediate possession of said premises and said indebtedness should become due and payable, without notice to the makers thereof.

Plaintiff further states, that he was obliged to purchase and did purchase and extension or continuation of Abstract of Title, to said premises, to enable him to intelligently prepare and prosecute this action, for which he was obliged to pay and did pay $14.50, which is a reasonable sum therefor, and which this plaintiff is entitled to recover from said defendants in this action, as agreed in said mortgage it should be paid and secured thereby and the same is a proper and reasonable charge therefor.

Plaintiff further states that the defendants, Alice Williford, Allie Griffin, Rose Williford, Millie McLish and George F. Rider have or claim to have some right, title, interest, lien, estate, claim or demand, of, in, or to said premises, or some part thereof, the exact nature of which is unknown to this plaintiff, but such right, title, interest, claim, lien or demand, of, in or to said premises, or some

part thereof, if any, had or claimed by said defendants, or any of them, is subject and inferior to the lien of plaintiff's said mortgage. [fol. 26] Plaintiff further states, that notwithstanding the notes, described in the prior counts of this petition are due and unpaid and notwithstanding repe-ted requests for payment of the same, and notwithstanding the agreements and promises of the defendants, the said J. A. White and Annie White, his wife, or any one for them, have wholly failed and neglected to pay the same, or any part thereof, or any interest thereon, and there remains due and unpaid this plaintiff for and because of said notes and mortgage, the sum of $120.00, with interest thereon from the 1st day of February, 1921, at the rate of 10% per annum by reason of the note described in the 1st count of this petition, and the further sum of $120.00, with interest thereon from the 1st day of February, 1922, at the rate of 10% per annum, by reason of the note described in the second count of this petition: $14.50, paid by this plaintiff for continuation of Abstract of Title: $60.00 Attorneys' fee due this plaintiff's Attorney as herein described.

Wherefore, plaintiff prays that said indebtedness aforesaid, represented by said notes and mortgage, executed by the defendants, J. A. White and Annie White, his wife, be established and determined, and that the lien of said mortgage securing said indebtedness be established by decree of this court, as superior to any lien, right, title, interest, claim or demand, at law or in equity, of the defendants or any of them herein, and each and all of them and all persons claiming by, through or under them, or any of them, except prior mortgage of $2,400.00, on said premises, and that this plaintiff have judgment against the defendants, J. A. White and Annie White, his [fol. 27] wife, for the sum of $120.00, with interest thereon at the rate of 10% per annum, from the 1st day of February, 1921, and for $120.00 with interest thereon from the 1st day of February, 1922, at the rate of 10% per annum, for and on account of said notes: $14.50 due this plaintiff, which he paid for extension or continuation of Abstract of Title; $50.00 due plaintiff's Attorney herein for bringing this action and that they be directed to pay said indebtedness within six months to this plaintiff and all of said sums advanced as aforesaid with interest thereon as therein provided and costs, of this action, and — case of default in the payment of said indebtedness or the repayment to this plaintiff of the sums advanced for continuation of Abstract of Title and Attorney's fee, and for any sum that he may advance in the payment of taxes or in redemption from tax sales on said premises, and Attorney's fee herein, that all and singular the mortgaged premises, being the lands and tenements hereinabove described, with all appurtenances thereto be sold by order, decree and direction of this court, without appraisement, in foreclosure of said mortgage given to this plaintiff and hereinabove described, and the proceeds thereof be applied to the payment of said indebtedness, interest, costs and Attorney's fee and the repaymen- to plaintiff of the sum so paid for continuation of Abstract of Title, and for any amount advanced by plaintiff for payment of taxes or redemption from tax sales, and that by said sale, the defendants and each of them, and each and all of them, and all persons claiming by, through or under

[fol. 28] them, or any of them, be foreclosed and forever barred from any right, title, interest, estate, lien, claim or deman-, at law, or in equity, in to or against said premises, and the lands and tenements so sold, and every part thereof, and upon confirmation of said sale to the purchaser, a dee- or deeds be issue- thereto, and that the purchaser or purchasers be let into possession of the premises so purchased, and that such writ or writs as may be necessary and proper be issued and for such other and further relief as to the court may seem just and proper, in the premises and for costs, subject however, to first mortgage on said premises.

Wilkins & Wilkins & W. Wallace Greene, Attorneys for Plaintiff.

[fol. 29] Sworn to by S. H. Davis; jurat omitted in printing.

[fol. 30] IN DISTRICT COURT OF LOVE COUNTY

[Title omitted]

PRAECIPE FOR SUMMONS—Filed May 5, 1922

To the Clerk of the District Court of Love County, Oklahoma:

Will you please issue summons in the above entitled cause to —— ——, making the same returnable on the — day of ——, 1922, and designate the — day of ——, 1922, as answer day, and deliver the same to the Sheriff of —— County, and endorse therein that if the defendants fail to answer, judgment will be taken for $120.00, with interest thereon from the 1st day of February, 1921, at the rate of 10% per annum; $120.00 with interest thereon from the 1st day of February, 1922, at the rate of 10% per annum; $14.50, amount expended for continuation of Abstract of Title, $60.00 Attorney's fees and costs of this action and foreclosure of mortgage on the following described real estate in Love County, Oklahoma, to-wit:

The Northeast Quarter of the Northeast Quarter of the Northeast Quarter and the South half of the North half of the Northeast Quar-[fol. 31] ter and the North half of the South half of the Northeast Quarter of Section 1, Township 9 South, Range 1 East.

W. Wallace Greene, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 32] IN DISTRICT COURT OF LOVE COUNTY

EXHIBIT IN EVIDENCE

Copy

Note No. 1

$120.00. Marietta, Oklahoma, Jan. 24, 1920.

On the first day of February, 1921, for value received, we promise to pay to the order of S. H. Davis, at the Commercial National Bank

Kansas City, Kansas, with exchange on New York, the principal sum of One-hundred-twenty and no/100 Dollars, with interest thereon at the rate of ten per cent per annum from maturity until its principal and interest are paid in full. If the interest is not paid when due it shall become as principal until its principal and interest are paid in full. *If the interest is not paid when due it shall become as principal and interest are paid in full*, and if this note is placed in the hands of an attorney for collection I hereby agree to pay a reasonable sum, which shall be not less than ten per cent of its principal and accrued interest, as attorney's fees, whether it is decreed in judgment or not.

(Signed) J. A. White, Annie White.

This note is secured by a duly recorded mortgage on real estate in Love County, State of Oklahoma.

[fol. 33] EXHIBIT IN EVIDENCE

Copy

Note No. 2

$120.00. Marietta, Oklahoma, Jan. 20, 1920.

On the first day of February 1922 for value received, we promise to pay to the order of S. H. Davis, at the Commercial National Bank, Kansas City, Kansas, with exchange on New York, the principal sum of One-hundred-twenty and no/100 Dollars, with interest thereon at the rate of ten per cent per annum from maturity until its principal and interest are paid in full. If the interest is not paid when due it shall become as principal until and bear interest from its maturity at the rate of ten per cent per annum, payable annually, until all principle and interest are *are* paid in full, and if this note is placed in the hands of an attorney for collection I hereby agree to pay a reasonable sum, which shall be not less than ten per cent of its principal and accrued interest, as attorney's fees, whether it is decreed in judgment or not.

(Signed) J. A. White, Annie White.

This note is secured by a duly recorded mortgage on real estate in Love County, State of Oklahoma.

[fol. 34] EXHIBIT IN EVIDENCE

Know all men by these presents that J. A. White and Annie White, husband and wife, of Love County, State of Oklahoma, as first parties have mortgaged and hereby mortgage to S. H. Davis, as second party, the following described real estate situated in Love County, State of Oklahoma, to-wit:

The Northeast Quarter of the Northeast Quarter of the Northeast Quarter (N. E. ¼ of N. E. ¼ of N. E. ¼) and the South Half of the North Half of the Northeast Quarter (S. ½ of N. ½ of N. E. ¼) and the North Half of the South Half of the Northeast Quarter (N. ½ of S. ½ of N. E. ¼) of Section One (1) Township Nine (9) South, Range One (1) East of the Indian Base and Meridian and containing in the aggregate 90 acres according to the United States Government Survey thereof, be the same more or less;

with the appurtenances, and warrant the title to said real estate.

This mortgage is given to secure the payment of the pri-cipal sum of two hundred forty and no/100 dollars according to the terms of two promissory notes of even date herewith, executed by said first parties payable to the order of said second party at The Commercial National Bank, Kansas City, Kansas, and being further described as follows:

Note No. 1, for $120.00, due February 1st, 1921;
Note No. 2, for $120.00, due February 1st, 1922,

with interest thereon (each note) at the rate of ten per cent per annum, payable annually, from maturity until paid.

This mortgage is given and made subject to one certain first mortgage of even date herewith, executed by said first parties in favor of said second party for $2,400.00, interest thereon and the covenants [fol. 35] and agreements therein made; Provided always, however, that if there should be default in the payment of any part of the principal or interest of said first mortgage or default in the payment of the taxes, assessments or insurance premiums therein referred to, or default in any of the covenants or agreements therein made, then, at the option of said second party, this mortgage shall additionally and collaterally to said first mortgage further secure the payment of such defaults or either of them, respectively.

Said first parties hereby covenant and agree to pay all of the principal and interest of said first mortgage as they mature and all of the taxes and assessments upon said real estate before they become delinquent, and to perform al- of the covenants and agreements by them made in said first mortgage, and if they fail to pay any part of the principal or interest of said first mortgage as they mature, or the taxes and assessments upon said real estate before they become delinquent, or the premiums for the insurance effected upon the buildings of said real estate, then they (said first parties) hereby agree that said second party or his assigns may pay or his assigns may pay said taxes, assessments and insurance premiums and the amount so paid together with the amount of the defaults, if any, on the principal or interest of said first mortgage, may be added, aggregately or respectively, to the principal sum secured by this mortgage and the payment thereof with interest at the rate of ten per cent per annum on the amount paid for taxes, assessments or insurance premiums from the date of such payments and interest at the rate of [fol. 36] ten per cent per annum on the default in the payments on the principal or interest of said first mortgage from the date of such

defaults, shall be secured by this mortgage in like manner and with like effect as for the payment of the principal debt hereby secured.

Now, if such payments are made as herein specified, and all of the covenants and agreements hereof are performed as herein provided, then this mortgage shall be void and shall be released by said second party, or his assigns, said first parties hereby agreeing to record said release and to pay for recording it. But if default be made in the payment of the principal or interest secured by this mortgage, or any part of either, as they mature, or in the payment of the principal and interest secured by said first mortgage, or any part of either, as they mature, or in the payment of taxes and assessments upon said real estate before they become delinquent, or in case of a breach in any of the covenants and agreements made in this mortgage or said first mortgage, then said second party, or his assigns, may, without notice elect to declare the whole debt secured by this mortgage due, and thereupon this mortgage shall become absolute and the said second party, or his assigns, may immediately cause it to be foreclosed in the manner prescribed by law, appraisement of said real estate and all of the benefits of the homestead, exemption and stay laws of the State of Oklahoma being by said first parties [fol. 37] hereby expressly waived.

And in case suit is brought to foreclose this mortgage, said first parties hereby further agree that they will pay a reasonable attorney's fee of $35.00 which this mortgage also secures.

Witness our hands this twenty-fourth day of January A. D. 1920.

(Signed) J. A. White. Annie White.

[File endorsement omitted.]

[fol. 38] In District Court in and for Love County

[Title omitted]

Motion to Strike—Filed June 1, 1922

Comes now the defendants, J. A. White and Annie White and move the court to require the plaintiff to strike from his petition in the first, second and third causes of action that portion of each cause of action referring to attorney's fees, and to require the plaintiff to elect as to whether he will claim the attorney's fee provided for in the notes or the attorney's fee provided for in the mortgage.

II. That the court require the plaintiff to strike that portion of his petition pertaining to the expense for supplemental abstracts as the petition shows on its face that he can not maintain an action for same.

Keller & Cameron, Attorneys for Defendants Above Named.

[File endorsement omitted.]

[fol. 39] IN DISTRICT COURT OF LOVE COUNTY

[Title omitted]

ANSWER—Filed October 3, 1922

Answer of Alice Williford, Allie Griffin, Rosie Williford, Millie McLish, and George E. Rider

Come now the above named defendants and for their answer to the petition of the plaintiff herein deny each and every allegation in said petition contained except such as may be hereinafter specifically admitted.

2. For further answer and defense the defendants state that the lands described in plaintiff's petition are lands that were selected by Frazier McLish in his lifetime, as an allotment to which he was entitled as a portion of his pro rata share of the lands of the Choctaw and Chickasaw Nations or Tribes of Indians, in Indian Territory (now State of Oklahoma), exclusive of his homestead allotment, and commonly called "surplus" lands, the said Frazier McLish being a full blood Chickasaw Indian duly enrolled as such on the Final Approved Chickasaw Roll opposite Number 3805. That the said [fol. 40] Frazier McLish departed this life in June in the year 1906, intestate and left surviving him his wife, the defendant Millie McLish, and his children Alice Williford, Allie Griffin and Rosie Williford, defendants herein; that his said widow, Millie McLish upon the death of her said husband Frazier McLish became, now is, and has been at all times since his death, entitled under the laws in force at the time of the death of her said husband, to a dower interest of one third for her natural lifetime in said hereinbefore referred to lands, being the lands described in the plaintiff's petition; and that the defendants Alice Williford, Allie Griffin and Rosie Williford, children as aforesaid of the said Frazier McLish inherited said lands, subject to the dower interest of their said motion. That the said Frazier McLish, deceased, left no other heirs. That the said defendants, Millie McLish, Alice Williford, Allie Griffin and Rosie Williford are the owners of said real estate as the widow and children and only heirs of the said Frazier McLish, deceased, and are entitled to the immediate possession thereof. That said Millie McLish and her said children full blood Chickasaw Indians, duly enrolled as such on the Final Approved Roll of such Chickasaw Indians, as approved by the Secretary of the Interior of the United States, their names, ages and roll numbers being as follows, towit:

Alice Williford (nee McLish) Chickasaw Roll No. 3073, age 33 years;

Allie Griffin (nee McLish) Chickasaw Roll No. 3074, age 30 years;

Rosie Williford (nee McLish) Chickasaw Roll No. 3075, age 28 years;

Millie McLish, Chickasaw Roll No. 3071, age 64 years.

[fol. 41] 3. Defendants Alice Williford, Allie Griffin, Rosie Williford and Millie McLish state that the defendants, J. A. White and Annie White his wife have been in the unlawful possession of said lands since November 15, 1907, and have since that date at all times been unlawfully withholding possession of said lands from these defendants last above named, and are in such unlawful possession thereof at this time. That said defendants further state that the said co-defendants of theirs above named, namely, J. A. White and Annie White, have collected and used for their own benefit during said time a period of thirteen years, the rents and profits arising from said real estate, amounting to Ten Thousand Dollars.

4. Defendants further state that the defendant Geo. E. Rider has an interest in said lands by virtue of a contract entered into with him by said widow and children of the said Frazier McLish defendants herein as aforesaid, said contract being of record in the office of the County Clerk of Love County Oklahoma, and as so recorded is hereby made a part hereof by this reference.

5. Defendants further answering, state that the note and mortgage upon which the suit of the plaintiff herein is based, both of which are set out in his said petition herein were executed by J. A. White and Annie White, co-defendants of these answering defendants, which said J. A. White and Annie White were in the unlawful possession of said lands, and that said J. A. White and Annie White did not have at the time of the execution of said instruments, and have never had, either prior to or subsequent to said time, any right, title, interest or estate in said premises, but that the defendants who are the widow and children of said Frazier McLish as aforesaid, have [fol. 42] been at all times since the death of the said Frazier McLish aforesaid the absolute owners in fee simple of said lands. That neither of said defendants, widow and children as aforesaid of said Frazier McLish deceased, joined in the execution of said instruments or either of them, and are in no way bound by said note and mortgage or either of them. That the defendants, J. A. White and Annie White, his wife, were wholly without authority to execute a mortgage covering said lands to secure said note.

6. Defendants further answering state that the plaintiff S. H. Davis and the defendants J. A. White and Annie White, his wife, set up title to said lands by the adverse possession thereof by the said J. A. White and Annie White, and assert that at the time of the execution of said note and mortgage to the plaintiff S. H. Davis the claim of the defendants herein answering was barred by the statute of limitations. That on November 3, 1920, these answering defendants filed, as plaintiffs, a suit in this Court against the said J. A. White for the possession of said lands and for rents and profits ar-ing therefrom during the time said J. A. White had been in the unlawful possession thereof; that a demurrer to said petition was thereafter filed by said J. A. White to the petition of said answering defendants herein as plaintiffs in said suit, in which it was alleged that the right of action of these answering defendants

were barred by the Statute of Limitations; that on April 19, 1921, said demurrer was sustained by this Court; that an appeal was taken from the judgment rendered by this court to the Supreme Court of Oklahoma, which appeal was filed in said Supreme Court on September 3, 1921, and is numbered 12,591, and is still pending and un- [fol. 43] disposed of; that the decision of the questions involved in said appeal and the rents therein will finally determine the rights of these answering defendants to said lands and the rents and profits arising therefrom, and that until such decision is rendered the said plaintiff herein should be prohibited from prosecuting this action, and that the same should be by the court stayed until said case on appeal is decided.

Wherefore the premises considered these answering defendants pray that all proceedings herein be stayed pending the decision of the Supreme Court in the case hereinbefore referred to; that upon final hearing of this case in this court that the plaintiff take nothing as against these answering defendants, and that they go hence with their costs; that these defendants have judgment against their co-defendants, J. A. White and Annie White, his wife, for the possession of said lands, and also judgment for ten thousand dollars the reasonable value of the rents and profits arising from said lands during their unlawful possession thereof; that this Court decree that the title of these answering defendants to said lands is valid and perfect, and that the said plaintiff and the defendants J. A. White and Annie White and neither of them, have no valid claim or title therein, nor any interest whatsoever in said premises; that the title of these answering defendants be quieted in said premises; and that said plaintiff, and said J. A. White and Annie White, defendants herein, be perpetually barred and enjoined from setting up or asserting any title or interest in said premises adverse to these answering defendants that the mortgage set out in the petition of the plaintiff herein be cancelled, set aside and held for naught, and removed as a cloud upon the title of these answering defendants to said lands; and for such other relief as may be equitable and proper, including their costs, [fol. 44] and will ever pray.

Geo. E. Rider, Attorney for said Answering Defendants Herein.

[File endorsement omitted.]

[fol. 45] In District Court of Love County

[Title omitted]

Order Sustaining Motion to Strike—Filed October 10, 1922

This cause coming on to be heard before me, this the 10th day of October, 1922, upon the motion of the defendants, J. A. White and Annie White to strike that part of plaintiff's petition, pertaining

to attorney's fees and to require the plaintiff to elect whether he would claim the attorney's fee provided in notes or the attorney's fee provided in the mortgage, and plaintiff being present by his attorneys, Wilkins & Wilkins, and defendants, J. A. White and Annie White being present by their attorneys, Keller & Cameron, and the Court being fully advised in the premises, is of the opinion that said motion should be sustained.

It is therefore ordered, adjudged and decreed that the motion be and the same is hereby sustained, and the plaintiff directed to elect the fee provided in the notes, and for good cause shown the defendants, J. A. White and Annie White, are hereby granted ten days in which to plead further to the petition of the plaintiff, or twenty days in which to file their answer to the petition of the plaintiff.

B. C. Logsdon, District Judge.

[fol. 46] [File endorsement omitted.]

[fol. 47] IN DISTRICT COURT OF LOVE COUNTY

[Title omitted]

ORDER GRANTING PLAINTIFF LEAVE TO FILE REPLY BRIEF OUT OF TIME—Filed October 19, 1922

On this the 19th day of October, 1922, for good cause shown the plaintiff is hereby allowed to file his reply to the answer filed herein by the defendants, Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and George E. Rider.

It is therefore ordered that said plaintiff may file his said reply out of time.

B. C. Logsdon, District Judge.

[File endorsement omitted.]

[fol. 48] IN DISTRICT COURT OF LOVE COUNTY

[Title omitted]

REPLY—Filed November 15, 1923

Now comes plaintiff herein and for reply to the answer of the defendants, Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and George E. Rider filed herein, denies each and every allegation of new matter therein contained and not herein specifically admitted.

Plaintiff admits that the land described in plaintiff's petition was allotted to one Frazier McLish, but denies that the said defendants are the surviving widow and heirs of said allottee.

Plaintiff further denies that the said Frazier McLish died intestate, but alleges the fact to be that the said Frazier McLish died on or about the 10th day of February, 1907, leaving a will which was executed in accordance with the laws of the United States of America [fol. 49] and in accordance with the laws of the state of Ark- then in force in the Indian Territory; that said will was admitted to probate by order of the United States Court for the Southern District of Indian Territory on or about the 20th day of March, 1907; that said will was and is a valid, complete instrument, and has not been set aside and no appeal was ever taken from the order admitting the same to Probate, and said will is in full force and effiect; that said will bears date on or about the 9th day of July, 190 , and was on said date approved by and acknowledged before the Honorable Thomas N. Robnett, United States Commissioner for the Southern District of Indian Territory, First Commissioner's District, in accordance with the Act of Congress of April 26, 1906; that by the terms of said will the lands described in his said petition were devised to one Julia Kemp, a sister of said decedent, who thereby became the owner of an- in possession of said premises and from whom title comes a copy of which said will and of the order admitting the same to probate is attached hereto, filed herewith, made a part of this reply, and marked Exhibit A.

For a further reply to separate answer of said defendants, plaintiff says that the cause of action, if any, said defendants ev-r had, which he denies, the same is long since barred by the Statute of Limitations and that if the said defendants had any right, title or interest in any of the said land and premises, which he denies; that the same is barred by the Statute of Limitation, and he pleads this said statute in bar of any right or claim of the said defendants or any of them, or [fol. 50] their assignee, George E. Rider, and denies that said defendants had any right, title or interest which they could contract, sell or convey, and denies that said defendant, George E. Rider, acquired any right, title or interest in or to said premises or any part thereof. This Plaintiff further says he has no knowledge or information of any suit between said defendants and defendant while — was not a party thereto.

Plaintiff further says that the said defendants permitted and suffered this plaintiff and his mortgagors to pay and expend large sums of money for the purchase of said land and to improve the same with full knowledge, and are and were guilty of laches and neglect, and are therefore estopped to now claim any right, title, interest or estate of, in or to said premises or any part thereof as against this plaintiff; that this plaintiff is an innocent mortgagee of said premises, and he parted with valuable consideration, relying on the title of the defendant, J. A. White, and without any knowledge or notice of any claim of the other defendants herein or any of them.

Wherefore, the prayer for the relief as in the petition herein is now renewed, and plaintiff further prays that the said defendants be [fol. 51] barred, restrained and enjoined from asserting any right,

title or interest in said premises or any part thereof, prior or superior to the lien of plaintiff's said mortgage.

Wil-ins & Wilkins, Attorneys for Plaintiff.

[fol. 52] EXHIBIT TO REPLY

Will

I, Frazier McLish, being of lawful age, and sound mind and disposing memory, do declare this to be my last will and testament, hereby revoking all others heretofore made by me at any time.

First. I hareby nominate and appoint Robinson Kemp, of Emet, I. T. to be the sole executor of this, my last will and testament.

Second. My will is that all my just debts and funeral expenses be paid out of my estate, either real or personal, by my said executor.

Third. I hereby give and bequeath to my wife, Millie McLish, one dollar, to my daughter Alice McLish one dollar, to my daughter Allie McLish one dollare and to my daughter Ruthir McLish one Dollar.

Fourth. After my debts and funeral expenses and the bequests given to my wife and children are all fully paid and discharged, I give, devise and bequeath unto my sister, Julia Kemp, all my property of every kind both real and personal, including all of my allotment in the Choctaw and Chickasaw Nations, which has now been taken in allotment by me and which may be taken in allotment for me after my death, and all moneys which are due me and may hereafter be due me from the United States or from the Choctaw and [fol. 53] Chickasaw Nations, as a member of the Chickasaw tribe of Indians.

In testimony whereof, I have hereunto set my hand and seal and do declare and publish this as my last will and testament this 9th day of July, 1906.

Frazier McLish.

We, James A. Cotner, George Cotner, and W. Wade, have hereunto subscribed our names as witnesses to the above and foregoing last will and testament of Frazier McLish at the request of the said Frazier McLish, and in his presence and in the presence of each other on this the 9th day of July, 1906.

James A. Cotner, George Cotner, W. Wade.

Approved July 9, 1906. Thomas N. Robnett, U. S. Commissioner for the Southern District, in accordance with the Act of Congress of April 26, 1906.

[fol. 54] EXHIBIT TO REPLY

IN THE UNITED STATES COURT FOR THE SOUTHERN DISTRICT OF THE INDIAN TERRITORY, SITTING AT TISHOMINGO

No. 563

IN THE MATTER OF THE ESTATE OF FRAZIER McLISH, Deceased,

Petition to Probate Will

Comes now Robinson Kemp you- petitioner herein, and represents to the court that Frazier McLish was a full blood Chickasaw Indian, and that during his life time he resided at Emet, I. T., that on July the 9th, 1906, the said Frazier McLish, who was at that time of lawful age, sound mind, and disposing memory, made his last will and test-ment disposing of all of his property both real and personal, that said will was made after passage of the Act of Congress of April 26th, 1906, which gave authority to all Citizens of the Chickasaw Nation to dispose of their property by will. That said will conforsms to the statutes. And that you- petitioner is nominated and appointed executor by the terms of said will.

That the said Frazier McLish died at Emet, I. T. in the Southern District of the Indian Territory, on or about the 10th day of February, 1907.

Wherefore your petitioner presents said will to the court and requests that the same be probated.

Roberson Kemp, Petitioner.

Subscribed and sworn to before me this the 19th day of March, 1907.

A. H. Nesbit, Notary Public.

[fol. 55] EXHIBIT TO REPLY

Filed in open Court March 20, 1907. C. M. Campbell, Clerk, by G. F. Gates, Dep. My commission expires Mar. 16, 1910. (Notarial Seal.)

Pro. 563

In re Estate of FRAZIER McLISH, Decd.

Order Probating Will

Now, at this time, it appearing to the Court that the proof of the Will of Frazier McLish, deceased, has been duly made as is required by law, it is therefore ordered by the Court that said will be and the same is hereby ordered probated.

Endorsed on back as follows: No. 1729. Reply. Filed in District Court, Love County, Oklahoma, Nov. 15, 1922. W. L. Richards, Court Clerk.

[fol. 56] IN DISTRICT COURT OF LOVE COUNTY

[Title omitted]

ORDER GRANTING DEFENDANT'S LEAVE TO FILE REPLY TO ANSWER—Filed November 3, 1922

It is hereby ordered by the Court that defendants J. A. White and Annie White have leave to file reply to answer and cross petition of Alice Williford, Allie Griffin, Rosa Williford, Millie McLish and Geo. E. Rider, out of time.

B. C. Logsdon, Judge.

[File endorsement omitted.]

[fol. 57] IN DISTRICT COURT OF LOVE COUNTY

[Title omitted]

REPLY OF DEFENDANTS TO ANSWER AND CROSS-PETITION—Filed November 3, 1922

Now come the defendants J. A. White and Annie White and for reply to the answer and cross petition of the defendants Alice Williford, Allie Griffin, Rosa Williford, Millie McLish and Geo. E. Rider say:

1st. These defendants deny all and singular the material allegations in said answer contained, except such as are herein after specifically admitted.

2nd. These defendants admit that the lands described in plaintiff's petition are a part of the allotment of Frazier McLish deceased; that the defendant J. A. White has been in exclusive, adverse, open and notorious possession of said lands exercising dominion over the same and claiming ownership thereof in fee since November 15, 1907.

3rd. These defendants show to the court that said J. A. White has been in actual, adverse, open and notorious and exclusive possession of said lands under deeds duly registered claiming ownership thereof exercising control thereof, expending large sums of money and making improvements upon said lands and paying taxes thereon since November 15th, 1907, under deed with covenants of general war-
[fol. 58] ranty, executed to defendant J. A. White by Julia Kemp joined by her husband, Robertson Kemp, for a good and valuable consideration, towit: the sum of $1,280.00 paid by defendant to said

Julia Kemp; that said deed is of record in Book 1, page 12, of the records of deeds in the office of the County Clerk in and for Love County, Oklahoma, to which record reference is hereby made.

4th. These defendants especially deny that said Frazier McLish died intestate and deny that the said Millie McLish as surviving wife inherited a dower interest in said land, from said Frazier McLish and deny that their said co-defendants own or owned any estate in said lands and that said Geo. E. Rider acquired any interest therein by virtue of his contract with said defendants.

5th. These defendants further show to the Court that any interest or claim said defendants, or any of them have, or may have had in and to said lands, or any part thereof is long since barred by the statutes of limitation in force in the Indian Territory now a part of the State of Oklahoma, on the 15th day of November, 1907, the time said defendant J. A. White acquired said lands and went into possession of same, and under the statutes of the State of Oklahoma; that defendants plead said statutes in bar of any right or claim of the said defendants or any of them and of their assignee, Geo. E. Rider.

6th. These defendants further say that said defendants, Millie McLish, Alice Williford, Allie Griffin, Rosa Williford, permitted and suffered defendant J. A. White and his mortgagees to pay out and expend large sums of money for the purchase of said lands and to improve the same with full knowledge that they are and were guilty of laches and negiect and are not estopped to assert any right, title, interest or estate in and to said premises or any part thereof against [fol. 59] defendant, J. A. White or plaintiff, Davis, that this defendant is an innocent purchaser of said premises for a valuable consideration replying upon the title of said Julia Kemp and without any knowledge or notice of any claim or demand of said defendants or either of them.

7th. These defendants further show to the court that said Frazier McLish died testate, on or about the 10th day of February, 1907; that the will of said Frazier McLish was duly executed in all things in accordance with the law of the United States and in accordance with the laws of the State of Arkansas then in force in the Indian Territory under and by virtue of Acts of the Congress of the United States; that said will was duly admitted to probate by the United States Court for the Southern District of Indian Territory on or about the 20th day of February, 1907; that said defendants filed no protest or contest and never appealed from the judgment of said Court probating said will; and that said will is and was in all respects valid, passing title to both real and personal property and is and was in full force and effect, and that under and by the terms of said will the said Julia Kemp became the owner in fee of said lands as devisee of the said Frazier McLish, deceased; that said will bears date on or about the 9th day of July, 1906, and was on said date acknowledged before and approved by the Hon. Thomas N. Robnett who was

then United States Commissioner for the Southern District of the Indian Territory, First Commissioner's District, in all things in accordance with the Act of Congress of April 26, 1906; and that by the terms of said will and the establishment and probate thereof the said Julia Kemp who was a sister of said Frazier McLish, thereby acquired and became the owner in fee and entitled to the possession of said lands.

[fol. 60] 8th. These defendants further show to the court that by her certain instrument in writing dated the 3rd day of May, 1907, and duly recorded in Miss. Record Book E, page 493, of the records of the United States Clerk and Ex-officio Recorder in and for District 26 of the Indian Territory to which reference is hereby made, the said Millie McLish acquiesced in and expressly ratified and confirmed the said will of the said Frazier McLish, deceased, and that said defendant J. A. White purchased said lands from said Julia Kemp and that said Millie McLish is now estopped to assert any right or claim in and to said lands or any part thereof.

9th. These defendants admit that in the case of Millie McLish, Alice Williford, Allie Griffin and Rosa Williford vs. J. A. White this court held that plaintiff's cause of action was barred by the statute of limitation; that said cause is now pending in the Supreme Court of the State of Oklahoma undetermined and that if the judgment of the lower court is affirmed by the Supreme Court it will settle this cause in so far as said above named plaintiffs in said cause of action are concerned.

Now having fully answered, answer and cross petition filed herein, these defendants pray that the said Alice Williford, Allie Griffin, Rosa Williford and Millie McLish and Geo. E. Rider, take nothing herein; and that these defendants go hence and recover their costs and for such other and general relief as these defendants may be entitled to receive, and will ever pray, etc.

Eddleman & Sneed, Attys. for J. A. and Annie White.

[File endorsement omitted.]

[fol. 61] In District Court of Love County

[Title omitted]

Trial.

Waiver of Trial by Jury

On this the 21st day of November, 1922, the above styled, numbered and entitled cause came on for trial, the plaintiff appearing in person and by his attorneys, Wilkins & Wilkins, and the defendant J. A. White and Annie White, in person and by their at-

torneys, Eddleman & Sneed, and the defendants Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and George F. Rider in person and by their attorney Geo. F. Rider, and the plaintiff and defendants announced ready for trial, waived a jury and agreed to submit all questions, both of law and fact, to the Court, whereupon the following proceedings were had in the order following:

[fol. 62] Plaintiff's Case

Colloquy Between Court and Counsel

By Mr. Wilkins, of counsel for plaintiff: Mr. Reporter I hand you three instruments which I desire marked as Plaintiff's Exhibits "A," "B," and "C."

(Instruments marked.)

By Mr. T. B. Wilkins, of counsel for plaintiff: If the Court please, I have had the two notes and mortgage sued on in this case marked as Plaintiff's Exhibits "A," "B" and "C," which I now offer in evidence.

Mr. Rider, of counsel for defendants Alice Williford, Allie Griffin, Rosie Williford, Millie McLish, and Geo. F. Rider: We object, incompetent, irrelevant and immaterial so far as the defendants Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and myself are concerned.

The Court: The Court will permit the instruments to be introduced at this time reserving a final ruling in this case. In case the Court rules in favor of the cross petitioners I will strike the exhibits.

Mr. Rider, of counsel for defendants, Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and myself: We except.

[fol. 63] Exhibit "A" in Evidence

Loan No. 1090. Note No. 1

$120.00. Marietta, Oklahoma, January 24, 1920.

On the first day of February, 1921, for value received we promise to pay to the order of S. H. Davis at The Commercial National Bank, Kansas City, Kansas, with exchange on New York, the principal sum of One Hundred Twenty and No/100 Dollars with interest thereon at the rate of ten per cent per annum from maturity until its principal and interest are paid in full. If the interest is not paid when due it shall become as principal and bear interest from its maturity at the rate of ten per cent per annum, payable annually, until all principal and interest are paid in full, and if this note is placed in the hands of an attorney for collection I hereby agree to pay a reasonable sum, which shall be not less than ten per cent of its principal

and accrued interest, as attorney's fees, whether it is decreed in judgment or not.

J. A. White, Annie White.

(Revenue 4c.)

(This note is secured by a duly recorded mortgage on real estate in Love County, State of Oklahoma.)

EXHIBIT "B" IN EVIDENCE

Loan No. 1090. Note No. 2

$120.00. Marietta, Oklahoma, January 24, 1920.

On the first day of February, 1922, For value received we promise [fol. 64] to pay to the order of S. H. Davis, at the Commercial National Bank, Kansas City, Kansas, with exchange on New York, the principal sum of One Hundred Twenty and No/100 Dollars, with interest thereon at the rate of ten per cent per annum from maturity until its principal and interest are paid in full. If the interest is not paid when due it shall become as principal and bear interest from its maturity at the rate of ten per cent per annum, payable annually, until all principal and interest are paid in full, and if this note is placed in the hands of an attorney for collection I hereby agree to pay a reasonable sum, which shall be not less than ten per cent of its principal and accrued interest, as attorney's fees, whether it is decreed in judgment or not.

J. A. White, Annie White.

(This note is secured by a duly recorded mortgage on real estate in Love County, State of Oklahoma.)

EXHIBIT "C" IN EVIDENCE

Second Mortgage—Form No. 51

Know all men by these presents, that J. A. White and Annie White, husband and wife, of Love County, State of Oklahoma, as first parties, have mortgaged and hereby mortgage to S. H. Davis as second party, the following described real estate situated in Love County, State of Oklahoma, towit:

The Northeast Quarter of the northeast quarter of the northeast quarter (N. E. ¼ of N. E. ¼ of N. E. ¼) and the south half of the north half of the northeast quarter (S. ½ of N. ½ of N. E. ¼) and the North half of the south half of the northeast quarter (N. ½ of S. ½ of N. E. ¼) of Section One (1) Township Nine (9) South [fol. 65] range one (1) East of the Indian Base and Merician and containing in the aggregate 90 acres according to the United States

Government Survey thereof be the same more or less, with the appurtenances, and warrant the title to said real estate.

This mortgage is given to secure the payment of the principal sum of Two Hundred Forty and No/100 Dollars, according to the terms of two promissory notes of even date herewith, executed by said first parties, payable to the order of said second party at The Commercial National Bank Kansas City, Kansas, and being further described as follows:

Note No. 1, for $120.00, due February 1st, 1921;
Note No. 2, for $120.00, due February 1, 1922.

With interest thereon (each note) at the rate of ten per cent per annum, payable — annually from maturity until paid.

This mortgage is given and made subject to one certain first mortgage of even date herewith executed by said first parties in favor of said second party for $2,400.00 interest thereon and the covenants and agreements therein made: Provided, always, however, that if there should be default in the payment of any part of the principal or interest of said first mortgage or default in the payment of the taxes, assessments or insurance premiums therein referred to, or default in any of the covenants or agreements therein made, then at the option of said second party, this mortgage shall additionally and collaterally to said first mortgage further secure the payment of such defaults or either of them, respectively.

Said first parties hereby covenant and agree to pay all of the principal and interest of said first mortgage as they mature and all of the taxes and assessments upon said real estate before they become delinquent and to perform all of the covenants and agreements by them [fol. 66] made in said first mortgage, and if they fail to pay any part of the principal or interest of said first mortgage as they mature, or the taxes and assessments upon said real estate before they become delinquent, or the premiums for the insurance as they mature, or the taxes and assessments upon said real estate, affected upon the same or the buildings on said real estate, they they (said first parties) hereby agree that said second party or his assigns may pay said taxes, assessments and insurance premiums and the amount so paid, together with the amount of the defaults if any, on the principal or interest of said first mortgage may be addedd, aggregately or respectively, to the principal sum secured by this mortgage and the payment thereof with interest at the rate of ten per cent per annum on the amount paid for taxes, assessments, or insurance premiums from the date of such payments and interest at the rate of ten per cent per annum on the default in the payments on the principal or interest of said first mortgage from the date of such defaults, shall be secured by this mortgage in like manner and with like effect as for the payment of the principal debt hereby secured.

Now, if such payments are made as herein specified, and all of the covenants and agreements hereof are performed as herein provided, then this mortgage shall be void and shall be released by said second party, or his assigns, said first parties hereby agreeing to record said release and pay for recording it. But if default be made in the

payment of the principal or interest secured by this mortgage, or any part of either, as they mature, or in the payment of the principal and interest secured by said first mortgage, or any part of either as they mature, or in the payment of taxes and assessments upon said real estate before they become delinquent, or in case of a breach in [fol. 67] any of the covenants and agreements made *made* in this mortgage or said first mortgage, then said second party or his assigns, may, without notice, elect to declare the whole debt secured by this mortgage due, and thereupon this mortgage shall become absolute and the said second party, or his assigns, may immediately cause it to be foreclosed in the manner prescribed by law, appraisement of said real estate and all of the benefits of the homestead, exemption and stay laws of the State of Oklahoma being by said first parties hereby expressly waived.

And in case suit is brought to foreclose this mortgage said first parties hereby further agree that they will pay a reasonable attorney's fee of $35.00 which this mortgage also secures.

Witness our hands this twenty fourth day of January, A. D. 1920.

J. A. White, Annie White.

STATE OF OKLAHOMA,
Love County:

Before me a Notary Public, in and for said County and State on this 30th day of January, A. D. 1920, personally appeared J. A. White and Annie White, husband and wife, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day, month and year last above written.

W. J. Gray, Notary Public. My Commission expires Jan. 29, 1923. (Seal.)

[fol. 68] Treasurer's Endorsement

I hereby certify that I received $.08 and issued receipt No. 3149 therefor in payment of mortgage tax on the within mortgage. Dated this 31st day of Jan., 1920.

Effie Smith, County Treasurer.

STATE OF OKLAHOMA,
Love County:

This mortgage was filed for record on this 31st day of Jan., 1920, at 4.15 P. M. and duly recorded in Book 15, of mortgages at page 590 thereof.

T. A. Murphey, County Clerk, by Vivian Pittman, Deputy.

Mr. T. B. Wilkins, of *county* for plaintiff: The Plaintiff rests, if the Court please.

[fol. 69] Defendants' Alice Williford, Allie Griffin, Rosie Williford, Millie McLish, and George F. Rider Case

MILLIE McLISH, being duly sworn according to law, called as a witness on the part of the defendants, testified as follows:

Direct examination.

By Mr. George F. Rider, of counsel for above defendants:

Q. State your name?
A. Millie McLish.
Q. What is your age?
A. Don't know my exact age.
Q. Give about how old you claim to be?
A. I don't know my age.
Q. Above seventy years old?
A. Somewhere thereabout or mayby more.
Q. Did you know Frazier McLish in his lifetime?
A. Yes, sir, I knew him when he was small.
Q. State whether or not you and Frazier McLish were ever married?
A. Yes, sir, we were married.
Q. State when you were married as near as you can?
A. It has been a good many years, I don't remember.
Q. You have any children?
A. I did not have any children when I married.
[fol. 70] Q. You have any children by Frazier McLish after you married?
A. We had three daughters.
Q. State the names of the three daughters?
A. Alice, Rosie and Allie. This is Al/ice and this is Rosie and Allie did not come.
Q. What are their names at this time—their married names? Who is Alice's husband?
A. Alice McLish, married Williford, and Allie married Griffin and Rosie married Williford.
Q. Two of your daughters married men by the name of Williford and one Griffin?
A. Yes, sir, that is right.
Q. Where do you live at this time?
A. Near Lebanon.
Q. Marshall County?
A. I don't know.
Q. Have you given the names of all of the children you had by Frazier McLish—in other words is that all the children you ever had?
A. Three, that is all.
Q. What is your nationality—what tribe of Indians, and what degree of Indian blood?
A. I don't know.

Q. You a Chickasaw?
A. Chickasaw.
Q. Chickasaw Indian?
A. Yes, sir.
Q. Full blood?
A. Yes.

Mr. Rider, of counsel for defendants above named: That is all.

[fol. 71] Cross-examination.

By Mr. A. Eddleman, of counsel for defendant J. A. White:

Q. Frazier McLish living or dead?
A. He is dead.
Q. You know when he died?
A. I don't know, very long, don't remember.
Q. You and Frazier McLish living together when he died?
A. No, sir, he had divorced me.
Q. Separated at that time—how long — you been separated when he died?
A. Not very long, probably a year.
Q. You get a divorce?
A. I did not get a divorce. I understood he did.
Q. Frazier McLish got a divorce?
A. He did not tell me, but that is what I heard afterwards.
Q. Did he get a divorce at Tishomingo?

Mr. Rider, of counsel for some of defendants: We object to this testimony in this manner, for the reason if he did there is a record of it and it will be the best evidence, unless she was present.
The Court: Sustain the objection as to that.

Q. You know what court he got a divorce in?

Mr. Rider, of counsel for some of defendants: We object.
The Court: Sustained.
[fol. 72] Mr. Eddleman, of counsel for Mr. J. A. White: If she knows I think she might testify.

Q. You know whether Frazier McLish got a divorce?
A. No, sir, I don't know.
Q. Where was Frazier McLish living at the time of his death?
A. He was living at Emmett.
Q. Who was he living with?
A. With his sister Julia Kemp.
Q. How long had he lived there before his death?
A. Ever since he divorced me, about a year.
Q. How did you obtain your information that he got a divorce?
A. I heard it through several sources, I don't remember any particular individual having told me, once I talked to him about getting a divorce, but he refused to talk to me about it.

Q. You talking to him about his getting a divorce or you getting a divorce from him?

A. I wanted the divorce but he would not consent to it.

Q. You ever bring suit in Indian Court for divorce?

A. No, sir.

Q. Isn't it a fact you and Frazier McLish had not lived together for a number of years before he died?

A. He had been gone along about a year. I was staying near Lebanon he came to see me once after he left.

Q. You get your information that Frazier got a divorce from any officer of the Court?

A. It was his sister I believe that told me.

Q. Julia Kemp?

A. Yes, sir.

[fol. 73] Q. Where else you get any information about it?

A. She talked to me about it that I remember.

Q. Any one else talk to you about it?

A. I don't remember of having been told by any one else except through her.

Q. You knew Sobe Lewis that used to be Judge of the Indian Court?

A. Yes, sir, I knew of him.

Q. You tell *you* anything about it?

A. No, sir, his sister is the only one that told me about it.

Q. How long was it before Frazier McLish died that Julia Kemp told you he—Frazier McLish—got a divorce?

A. Just after he died I saw his sister in town and she told me about it.

Mr. Eddleman, of counsel for defendant White: That is all just now.

Redirect examination.

By Mr. Rider, of counsel for McLish heirs:

Q. The same sister that claimed to have a will from Fraizer McLish?

A. He was staying with his sister when he did, yes.

Q. What I want is this, after he died his sister told you about this divorce, that is the same sister that claimed to have a will to all this property of Fraizer's?

A. No, sir, she never told me about it.

Q. What was the name of the sister that told you about the divorce?

A. Julia Jemp.

[fol. 74] Q. That the wife of Robinson Kemp?

A. Yes, sir.

Q. And sister of Frazier McLish?

A. Yes, sir.

Witness excused.

[fol. 75] COLLOQUY BETWEEN COURT AND COUNSEL

By Mr. Rider, of counsel for McLish heirs: It is agreed by and between the parties to this suit that the rental value of the property described in the petition in this case during the time the same has been in the possession of the defendant J. A. White the sum of $2.00 per acre per year. It has been further agreed between myself and counsel representing others in this case that the enrollment records, the rolls of the Chickasaw Indians show that Frazier McLish was a duly enrolled Chickasaw Indian as alleged in the answer of Millie McLish and others, and also that Alice Williford under the name of McLish, and Allie Griffin under the name of McLish and Rosie Williford under the name of McLish and Millie McLish, the witness who just left the stand, were each of them duly enrolled full blood Indians, their names appearing on the rolls opposite the numbers alleged in the answer.

Mr. Rider, of counsel for McLish heirs: We now hand to the reporter an instrument and ask that the same be marked as defendants' Millie McLish, et al., exhibit One.

(Instrument marked.)

We now offer in evidence the original patent in this case issued to Frazier McLish, which has been marked as defendants' exhibit One.

The Court: Let it be admitted in evidence.

[fol. 76] DEFENDANT'S MCLISH HEIRS EXHIBIT ONE

Allotment Patent. 185. Chickasaw by Blood Roll No. 3805. No. 1501. Date of Certificate, May 29, 1903.

The Choctaw and Chickasaw Nations, Indian Territory, to all to whom these present- shall come, Greeting:

Whereas, by the Act of Congress approved July 1, 1902, (32 Stat. 641) and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and,

Whereas, it was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allottable land of Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue; and

Whereas, the said Commission to the Five Civilized Tribes has certified that the land hereinafter described -as been selected by or on behalf of Frazier McLish a citizen of the Chick-saw Nation, as an allotment, exclusive of land equal in value to one hundred and sixty acres of the aver*gae* allottable lands of the Choctaw and Chickasaw Nations selected as a homestead as aforesaid:

[fol. 77] Now, therefore, we the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation by virtue of the power and authority vested in us by the twenty ninth section of the Act of Congress of the United States, approved June 28, 1898, (30 Stat. 495) have granted and conveyed, and by these presents do grant and convey unto the said Fraizer McLish all right, title and interest of the Choctaw and Chickasaw Nations and of all other citizens of said Nations; in and to the following described land viz:

The Northeast quarter of the Northeast quarter of the northeast quarter and the south half of the north half of the northeast quarter and the north half of the south half of the north half and the south half of the southwest quarter of the northwest quarter and the southwest quarter of the southeast quarter of the northwest quarter of section One (1) Township Nine (9) South and Range One (1) East (Chickasaw Nations).

of the Indian Base and Meridian, in Indian Territory, containing one Hundred and Sixty (160) Acres, more or less, as the case may be according to the United States survey thereof, subject however to the provisions of the Act of Congress approved July 1, 1902. (32 Stat. 641).

In Witness Whereof, we the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the dates hereinafter shown.

Green McCurtain, Principal Chief of the Choctaw Nation. [fol. 78] Date, November 22, 1904. (Seal.) Douglas H. Johnson, Governor of the Chickasaw Nation. Date, December 9, 1904. (Seal.)

Department of the Interior. Approved Oct. 31, 1905. Ethan A. Hitchcock, Secretary, by Oliva A. Phelps, Clerk.

Filed for Record on the 7th day of Nov., 1905, at 9 o'clock A. M., and recorded in Book 5, page 579. Tams Bixby, Commissioner to the Five Civilized Tribes, by Hal Belford, Clerk.

[fol. 79] Mr. Rider, of counsel for defendants, McLish heirs: We now offer in evidence the contract and approval thereof by the County Court of Johnson County, Oklahoma, between myself and the defendants in this case, showing to be approved September 13, 1920, and ask that the same be marked as Exhibit 2. Further, we offer in evidence the petition in error and transcript attached thereto

in the case on appeal, and referred to in my answer, and it is agreed by counsel for plaintiff, and the other defendants that that case is still pending and undisposed of, and ask that the petition in error and transcript be marked as our defendants, the McLish heirs' exhibit 3.

The Court: Al- right, let them go in.

McLish Heirs' Exhibit 2

(Contract follows this instrument)

State of Oklahoma,
Johnson County:

In the County Court

#1067

In the Matter of the Estate of Frazier McLish, Deceased

Decree of Approval of Attorney's Contract

Now on this 13th day of September, 1920, there being presented to the court an attorney's contract entered into by and between Alice Williford, Allie Griffin, Rosie Williford and Millie McLish [fol. 80] as parties of the first part and Geo. E. Rider, an attorney of Madill, Oklahoma, as party of the second part, from which it appears that parties of the first part have employed party of the second part to recover the undivided interest of each of the parties of the first part in and to certain lands allotted to Frazier McLish, Chickasaw Roll No. 3805, and inherited by parties of the first part, which said lands are described as follows, to wit:

N. E. ¼ of N. E. ¼ of N. E. ¼ and S. ½ of N. ½ of N. E. ¼ and N. ½ of S. ½ of N. ½ and S. ½ of S. W. ¼ of N. W. ¼ and S. W. ¼ of S. E. ¼ of N. W. ¼ of Section 1, twp. 9 south, and Range one east,

of the Indian Base and Meridian, Love County, Oklahoma, containing 160 acres, more or less, as the case may be, according to the United States Survey thereof.

The Court finds from statements made to the court by parties of the first part on August 23, 1920, at which time the United States Pro' ate Attorney was present, that each of said parties has willingly entered into said contract; that said contract provides that said attorney shall receive for his services an undivided one fourth share and interest in said lands and in all back rents recovered; that party of the second part as attorney for parties of the first part will bring and prosecute any suit or suits necessary to recover for parties of the first part their respective undivided interest in said lands and all back rents; and that said lands are held adversely to parties of the first part, and their rights therein denied; that all necessary court

costs are to be advanced by party of the second part; that party of the second part is to receive for his said services as attorney said one fourth share of said lands and back rents whether same are recovered as result of litigation or by a settlement made by parties of the first part, and that any settlement made shall be subject to [fol. 81] the rights of the party of the second part.

The Court further finds that each of the parties of the first part to said contract is a full blood Chickasaw Indian being enrolled as follows, to wit:

Alice Williford (nee McLish) Chickasaw Roll No. 3073, age 31 years; Allie Griffin (nee McLish) Chickasaw Roll No. 3074, age 28 years; Rosie Williford (nee McLish) Chickasaw Roll No. 3075, age 26 years; Millie McLish, Chickasaw Roll No. 3071, age 62 years.

The Court further finds that parties of the first part have executed to party of the second part a deed conveying said undivided one fourth interest in said lands and back rents to party of the second part, and that parties of the first part agree that said deed may be approved by his Court when said services have been fully performed by party of the second part, either as result of litigation, or by settlement satisfactorily made by parties of the first part.

The Court finds that said attorney's contract is fair and reasonable, and that it is for the best interests of the parties of the first part thereto that the same be entered into by them.

It is therefore considered, ordered and decreed by the Court that said contract be and the same is hereby in all things approved.

C. M. Crowell, County Judge.

STATE OF OKLAHOMA,
Love County:

This instrument was filed on this 25th day of Sept. A. D., 1920, 8 o'clock A. M., and duly recorded in Book 26, on page 493, fee $—.
[fol. 82] A. K. Wilcoxson, County Clerk, by Vivian Pittman, Deputy.

Attorney's Contract

STATE OF OKLAHOMA,
Love County:

This agreement, made and entered into by and between Alice Williford, Allie Griffin, Rosie Williford and Millie McLish, hereinafter called parties of the first part, and Geo. E. Rider, an attorney at law, of Madill, Oklahoma, party of the second part.

Witnesseth, That parties of the first part hereby employ party of the second part to recover the undivided interest of each of the parties of the first part in and to certain lands allotted to Frazier McLish, Chickasaw Roll No. 3805, and inherited by parties of the first part, which said lands are described as follows, to wit:

N. E. ¼ of N. E. ¼ of N. E. ¼ and S. ½ of N. ½ of N. E. ¼ and N. ½ of S. ½ of N. ½ and S. ½ of S. W. ¼ of N. W. ¼ and

S. W. ¼ of S. E. ¼ of N. W. ¼ of Section 1, Twp. 9 S. R. 1 E. of the Indian Base and Meridian, Love County, Oklahoma,

containing 160 acres more or less, as the case may be, according to the United States Survey thereof.

Party of the second part hereby accepts said employment; and it is agreed by and between the parties hereto that party of the second part, as such attorney, will bring and prosecute any suit or suits, necessary to recover for parties of the first part their undivided interests in said lands and all back rents, revenu*es* *na*- profits to which they may be entitled, it being understood between the parties [fol. 83] hereto that said lands are held adversely by other persons who deny the rights of parties of the first part thereto.

Party of the second part shall receive as his compensation for such services an undivided one fourth share and interest in and to said above described lands, and in and to all rents, revenues and profits that may be recovered as aforesaid. Parties of the first part have executed to party of the second part a deed conveying said one fourth interest, and they and each of them hereby agree that said deed may be approved by the county Court of Johnston County, Oklahoma, which said services have been performed, if as a result of such services parties of the first part shall obtain possession of such land, or if there shall be a settlement made by parties of the first part satisfactory to them with the person or persons now holding or claiming title to said lands. Party of the second part agrees to advance the necessary court costs, and to diligently and faithfully perform the usual services of an attorney relative to the recovery for parties of the first part their said interests in said lands and said rents, revenues and profits. Any settlement made by parties of first part shall be subject to the rights of party of the second part.

Witness our hand this August 24, 1920.

Alice Williford, Allie Griffin, Rosie Williford, Millie McLish (x her mark), Parties of the First Part. Geo. E. Rider, Party of the Second Part.

[fol. 84] I signed the name of Millie McLish hereto at her request and in her presence, she not being able to write, but making her mark this August 24, 1920.

W. D. Lynn.

Additional witness: J. H. Layan.

State of Oklahoma,
Marshall County:

Before me the undersigned a Notary Public, in and for Marshall County, State of Oklahoma, on this August 24, 1920, personally appeared Millie McLish to me known to be the identical person who executed the within and foregoing instrument by her mark, in my presence and in the presence of W. D. Lynn and J. H. Layan, as witnesses, and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

And also before me the said undersigned, Notary Public, in and for said County and State on this August 24, 1920, personally appeared Alice Williford, Allie Griffin, Rosie Williford and Millie McLish to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

In Witness whereof I have hereunto set my hand and affixed my official seal this August 24, 1920, in Marshall County, Oklahoma.

W. T. Lester, Notary Public. My Commission expires January 26, 1924. (Seal.)

[fol. 85] O. K. T. B. Orr, Probate Atty.

I hereby approve the above and foregoing contract, this 13th day of September, 1920.

C. M. Crowell, County Judge.

STATE OF OKLAHOMA,
Love County:

This instrument was filed on this 25th day of September, A. D., 1920, at 8 o'clock A. M., and duly recorded in Book 26, on page 491.

A. K. Wilcoxson, County Clerk, by Vivian Pittman, Deputy.

[fol. 86] **Defendant's Exhibit 3**

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MILLIE McLISH, ALICE WILLIFORD (nee McLISH), ALLIE GRIFFIN (nee McLish), Rosie Williford (nee McLish), Plaintiffs in Error,

vs.

J. A. WHITE, Defendant in Error

PETITION IN ERROR

The above named Millie McLish, Alice Williford (nee McLish), Allie Griffin (nee McLish) and Rosie Williford (nee McLish) plaintiffs in error, complain of said defendant in error J. A. White, for that the said J. A. White, at the March, 1921, term of the District Court of Love County, State of Oklahoma, recovered a judgment by the consideration of said court against the said Millie McLish, Alice Williford (nee McLish), Allie Griffin (nee McLish) and Rosie Williford (nee McLish) in a certain action then pending in said court wherein the said Millie McLish, Alice Williford (nee McLish), Allie Griffin (nee McLish) and Rosie Williford (nee McLish) were plaintiffs and the said J. A. White was defendant.

A certified transcript of the record of said court is hereunto attached, marked Exhibit A and made a part of this petition in error.

And the said Millie McLish, Alice Williford (nee McLish), Allie Griffin (nee McLish) and Rosie Williford (nee McLish) plaintiffs in error aver that there is error in the said record and proceedings in this to-wit:

First. Said court erred in sustaining the demurrer of the defend-
[fol. 87] ant in error on the ground that the petition of plaintiffs in error (plaintiffs below) did not set out a state of facts sufficient to constitute a cause of action in favor of the plaintiffs below and against the defendant below.

Second. Said court erred in sustaining the demurrer of the defendant in error on the ground that the plaintiffs in error plaintiffs below, as it appeared from the facts stated in their said petition were each of them barred by the statute of limitations.

Third. That said Court erred in holding and deciding that the causes of action set forth in the petition of the plaintiffs in error (plaintiffs below) were each of them barred by the Statute of Limitation of the State of Arkansas, held by said court to be in force at the time of the action of plaintiff in error (plaintiffs below) accrued, and in sustaining the demurrer of the defendant in error (defendant below) in pursuance to said holding and decision.

Fourth. That said court erred in sustaining the demurrer of the defendant in error (defendant below) upon each and every of the several grounds thereof for the reasons, as held by said Court, that the action of plaintiffs in error (plaintiffs below) for the recovery of the land described in the petition, and for the rents and revenues arising therefrom as therein set forth, was barred by the Statute of Limitation of the State of Arkansas in force at the time said action accrued, and for the further reason that said petition did not state a cause of action.

Wherefore plaintiffs in error pray that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of plaintiffs in error, and that the plain-
[fol. 88] tiffs in error may be restored to all rights that they lost by the rendition of such judgment and for such other relief as to the court may seem just.

Geo. E. Rider, Attorney for Plaintiffs in Error.

EXHIBIT "A" TO EXHIBIT 3

IN THE DISTRICT COURT, LOVE COUNTY, STATE OF OKLAHOMA

No. 1348

MILLIE McLISH, ALICE WILLIFORD (nee McLish), ALLIE GRIFFIN (nee McLish), Allie Griffin (nee McLish), and Rosie Williford (nee McLish), Plaintiffs,

vs.

J. A. WHITE, Defendant

Transcript

Geo. E. Rider, Madill, Oklahoma, Attorney for Plaintiffs.
Eddleman & Sneed, Ardmore, Oklahoma, Attorneys for Defendant.

[fol. 89] STATE OF OKLAHOMA,
County of Love:

IN THE DISTRICT COURT

No. 1348

MILLIE McLISH, ALICE WILLIFORD (nee McLish), ALLIE GRIFFIN (nee McLish), and Rosie Williford (nee McLish), Plaintiffs,

vs.

J. A. WHITE, Defendant

Index

[fol. 90] STATE OF OKLAHOMA,
County of Love:

IN THE DISTRICT COURT

MILLIE McLISH, ALICE WILLIFORD (nee McLish), ALLIE GRIFFIN (nee McLish), and Rosie Williford (nee McLish), Plaintiffs,

vs.

J. A. WHITE, Defendant

PETITION

Come now the plaintiffs, Millie McLish, Alice Williford (nee McLish), Allie Griffin (nee McLish) and Rosie Williford (nee

McLish) and for cause of action against the defendant, J. A. White, allege and state:

1. That the plaintiff Millie McLish is the widow of Frazier McLish and the plaintiffs Alice Williford (nee McLish), Allie Griffin (nee McLish) and Rosie Williford (nee McLish) are the children of the said Frazier McLish by the said Millie McLish, the said Frazier McLish and the said Millie McLish being husband and wife. That the said Frazier McLish was a full blood Chickasaw Indian, being duly enrolled as such on the Final Approved Chickasaw Roll opposite Number 3805; that the said Frazier McLish departed this life in June the year 1906, intestate, and left surviving him the said widow, the plaintiff Millie McLish who became, and now is entitled under the law in force at the time of his death to a dower interest of one third for her natural life time of the lands hereinafter described; and that the plaintiffs Alice Williford (nee McLish), Allie Griffin (nee McLish) and Rosie Williford (nee McLish) inherited [fol. 91] said lands as his said children, subject to the dower interest of their said mother, the said Millie McLish. That the said Frazier McLish, deceased, left no other heirs.

2. That there was selected by the said Frazier McLish in his lifetime, and duly allotted to him, as provided by law, his pro rata share of the lands of the Choctaw and Chickasaw Nations or Tribes of Indians in Indian Territory (now State of Oklahoma), and that that part of said lands which were exclusive of his homestead allotment, and commonly called surplus lands are situated in what is now Love County, Oklahoma, and are described as follows, towit:

N. E. ¼ of N. E. ¼ of N. E. ¼ and S. ½ of N. ½ of N. E. ¼ and N. ½ of S. ½ of N. ½ and S. ½ of S. W. ¼ of N. W. ¼ and S. W. ¼ of S. E. ¼ of N. W. ¼ of Section 1, Twp. 9 South, Range 1 East,

(Chickasaw Nation) of the Indian Base and Meridian, containing 160 acres, more or less, as the case may be, according to the United States Survey thereof. That thereafter partent was duly issued for said lands, a true copy of which is hereto attached, marked Exhibit A and made a part hereof by this reference. That a duly certified copy of said patent was filed for record on January 13, 1915, and is now to be found duly recorded in the office of the County Clerk of Love County, Oklahoma, in Book 1 at page 617.

3. That the plaintiffs are the owner- of said real estate as the widow and only heirs and children, respectively, of the said Frazier McLish, deceased, and are entitled to the immediate possession thereof.

4. That each of said plaintiffs is a full blood Chickasaw Indian, duly enrolled as such on the final approved roll of such Chickasaw Indians, as approved by the Secretary of the Interior of the United States, their names, ages and roll numbers being as follows, towit: [fol. 92] Alice Williford (nee McLish), Chickasaw Roll No. 3073, age 31 years; Allie Griffin (nee McLish) Chickasaw Roll No. 3074,

age 28 years; Rosie Zilliford (nee McLish) Chickasaw Roll No. 3075, age 26 years; Millie McLish, Chickasaw Roll No. 3071, age 62 years.

5. Plaintiffs state that the defendant J. A. White has been in the unlawful possession of said lands since November 15, 1907, and has since that date at all times been unlawfully withholding possession of said lands from these plaintiffs and is in such unlawful possession thereof at this time. That said defendant -as collected and used for his own benefit during said time, a period of thirteen years the rents and profits arising from said real estate, amounting to $10,000.00.

Wherefore the premises considered, plaintiffs pray judgment for the possession of said lands and for $10,000.00 for rents and profits, their costs and all other relief proper.

Geo. E. Rider, Attorneys for Plaintiffs.

(Exhibit A, Patent, See Page —, this record.)

Petition endorsed as follows: Millie McLish et al. vs. J. A. White. No. 1348. Petition. Filed in District Court of Love County, Oklahoma, Nov. 3, 1920. W. L. Richards, Court Clerk. Geo E. Rider, Madill, Oklahoma, Attorney for Plaintiffs.

[fol. 93] In the District Court in and for Love County, State of Oklahoma

No. 1348

Millie McLish et al., Plaintiffs,

vs.

J. A. White, Defendants

Demurrer

Now comes the defendant J. A. White and demurs to the petition filed against him in the above styled cause and for causes of said demurrer says:

1. To so much and such parts of said petition as seek to recover possession of land therein described and all other proper relief this defendant demurs and says:

1. That said petition does not set out a state of facts sufficient to constitute a cause of action in favor of the plaintiffs and against this defendant.

2. Because it doth appear from the fact of said petition that the plaintiffs and each of them are barred by the statutes of Limitations.

To so much and such parts of said petition as seek to recover rents and profits for a period of 13 years and in the amount of $10,000.00, this defendant demurs and says:

1. That said petition does not state facts sufficient to constitute a cause of action in favor of plaintiffs and against this defendant.

2. Because it doth appear from the face of said petition that the plaintiffs and each of them are barred from any right of action by the statute of limitations.

To the petition as a whole this defendant demurs and for grounds of said demurrer says:

[fol. 94] 1. That said petition does not set forth facts sufficient to constitute a cause of action of the plaintiff and against the defendant.

2. That it doth appear from the face of said petition that any right of action the plaintiffs may have had has been barred by the Statute of Limitations.

Eddleman & Sneed, Attorneys for Defendant.

Endorsed: Filed in District Court Dec. 3, 1920. W. L. Richards, Court Clerk, Love County, Okla. No. 1348.

[fol. 95] STATE OF OKLAHOMA,
Love County:

IN THE DISTRICT COURT

No. 1348

MILLIE MCLISH, ALICE WILLIFORD (nee MCLISH), ALLIE GRIFFIN (nee MCLISH), and ROSIE WILLIFORD (nee MCLISH), Plaintiffs,

vs.

J. A. WHITE, Defendant

ORDER SUSTAINING DEMURRER TO PETITION AND DISMISSING ACTION

Now on this April 19, 1921, the same being one of the regular judicial days of the March, 1921, term of the District Court within and for Love County, State of Oklahoma, there came on regularly to be heard the demurrer of the defendant to the petition of the plaintiffs in cause No. 1348, entitled Millie McLish, et al. vs. J. A. White, defendant, and said plaintiffs and defendant appearing by their respective attorneys of record herein and said demurrer having been presented to the court, and the court after hearing argumnt of counsel thereon and being well and sufficiently advised in the premises finds that said demurrer upon each and every of the several grounds thereof as set forth therein should be sustained for the reason that the

action of the plaintiffs for the recovery of the lands described in the petition, and for the rents and revenues arising therefrom as therein set forth, is barred by the Statute of Limitation of the State of Arkansas in force at the time said action accrued, and for the further reason that said petition does not state a cause of action.

It is therefore considered, ordered and adjudged by the Court that the demurrer of the defendant to the petition of the plaintiffs be, [fol. 96] and as to each and every of the several grounds of said demurrer as set forth therein, and the same is hereby sustained. To which action of the court in sustaining said demurrer upon each and every of the grounds thereof as set forth therein the plaintiffs in open Court at the time duly excepted.

And the said plaintiffs by their attorney of record herein refusing to plead further, it is further considered, ordered and adjudged by the Court that the petition of said plaintiffs be, and the same is hereby dismissed, to which action of the court in dismissing said petition the plaintiffs by the said attorney in open Court at the time excepted.

And thereupon in open Court immediately after the sustaining of said demurrer as aforesaid by the Court and dismissing, as aforesaid, the petition of plaintiffs said plaintiffs and each of them, by their attorney aforesaid, gave notice of their intention of said plaintiffs and each of them to appeal from the action and decision of the court in sustaining said demurrer as aforesaid and dismissing said petition to the Supreme Court of the State of Oklahoma; and upon the giving of such notice of intention to appeal it was ordered by the Court that the Court Clerk enter said notice of intention to appeal upon the trial docket of this court as required and provided by law. And it appearing that said notice has been so entered by the Court Clerk, it is further ordered that no further notice shall be required to be served upon said defendant of the appeal of plaintiffs as aforesaid.

B. C. Logsdon, District Judge.

[fol. 97] STATE OF OKLAHOMA,
County of Love:

IN THE DISTRICT COURT

No. 1348

MILLIE McLISH, ALICE WILLIFORD (nee McLISH), ALLIE GRIFFIN (nee McLish), and Rosie Williford (nee McLish), Plaintiffs,

vs.

J. A. WHITE, Defendants

CLERK'S CERTIFICATE

I, W. L. Richards, Court Clerk, in and for Love County, State of Oklahoma, hereby certify that the above and foregoing, same being the petition, demurrer and order sustaining demurrer to petition and

dismissing action, is a true and correct copy of such pleadings and order of the court thereon, in the case of Millie McLish, et al. vs. J. A. White, No. 1348, as the same appears on file and of record in my office.

In Testimony whereof I hereunto set my hand and seal of office this 3rd day of May, A. D., 1921.

W. L. Richards, Court Clerk, Love County, Oklahoma. (Seal.)

[fol. 98] Mr. Geo. E. Rider, of counsel for McLish heirs: We now rest, if the Court please.

[fol. 99] Defendants' J. A. White and Annie White Case

By Mr. T. B. Wilkins, of counsel for plaintiff, S. H. Davis: We have here a certified copy of all the proceedings in the will matter at Tishomingo, and it is agreed by Mr. Rider that it may be admitted in evidence, and the certificate of the abstracter may be taken in lieu of the Clerk. He admits their correctness, and that they are copies of the original orders, petition, etc., including the testimony taken by Judge Robnett. We have had the same marked as Defendants J. A. White and Annie White's exhibit "D" and offer the same in evidence.

The Court: All right, let it go in.

Defendants' Exhibit "D" (of J. A. White and Annie White)

No. 3536

Abstract of title to the following described real estate situated in ——.

(Certified Copies of Court Proceedings in the Matter of the Estate of [fol. 100] Frazier McLish, Deceased, Probate No. 563, Robinson Kemp, Administrator.

In the United States Court for the Southern District of the Indian Territory, Sitting at Tishomingo

In the Mater of the Estate of Frazier McLish, Deceased

Petition to Probate Will

Comes now Robinson Kemp, your petitioner herein and represents to the Court that Frazier McLish was a full-blood Chickasaw Indian and that during his life time he resided at Emet, I. T., that on July the 9th, 1906, the said Frazier McLish who was at that time of lawful age, sound mind and disposing memory, made his last will and

testament disposing of all of his property both real and personal, that said will was made after passage of the Act of Congress of April 26th, 1906, which gave authority to all Citizens of the Chickasaw Nation to dispose of their property by will. That said will conforms to the Statutes. And that your petitioner is nominated and appointed executor by the terms of said will.

That the said Frazier McLish died at Emet, I. T., in the Southern District of the Indian Territory, on or about the 10th day of February, 1907.

Wherefore your petitioner presents said will to the Court and requests that the same be probated.

Roberson Kemp, Petitioner.

Subscribed and sworn to before me this 19th day of March, 1907. A. H. Nesbit, Notary Public. My Com. Exp. Mar. 16, 1910. (Seal.)

#563. Filed in open Court March 20, 1907. C. M. Campbell, Clerk, by G. F. Gates, Dep.

[fol. 101] RECORD UNITED STATES COURT IN THE INDIAN TERRITORY, SOUTHERN DISTRICT

9th Day, March, 1907, Term

Pro. 563

In re Estate of FRAZIER McLISH, Dec'd.

Wednesday, March 20, 1907.

Comes now Roberson Kemp in person and by counsel and files his petition to probate the will of Frazier McLish, deceased.

It is thereupon ordered by the Court that the same be referred to Geo. F. Gates, Deputy U. S. Clerk to take the proof of same as required by law.

Recorded in Journal "C," page 281.

WILL

I, Frazier McLish, being of lawful age, and sound mind and disposing memory, do declare this to be my last will and testament; hereby revoking all others heretofore made by me at any time.

First. I hereby nominate and appoint Roberson Kemp of Emit, I. T., to be the sole executor of this, my last will and testament.

[fol. 102] Second. My will is that all just debts and funeral expenses be paid out of any of my estate, either real or personal, by my said executor.

Third. I hereby give and bequeath to my wife, Millie McLish, one dollar; to my daughter, Alice McLish one dollar; to my daughter, Allie McLish one dollar; and to my daughter, Ruthie McLish one dollar.

Fourth. And the bequests given to my wife and children after my debts and funeral expenses are all fully paid and discharged, I give, devise and bequeath unto my sister, Julia Kemp all my property of every kind and both real and personal, including all of my allotment in the Choctaw and Chickasaw Nations which has now been taken in allotment by me and which may be taken in allotment for me after my death, and all moneys which are due me and may hereafter be due me from the United States or from the Choctaw and Chickasaw Nations as a member of the Chickasaw Tribe of Indians.

In Testimony whereof, I have hereunto set my hand and seal and do declare and publish this as my last will and testament this 9th day of July, 1906.

Frazier McLish.

We James A. Cotner, George Cotner and W. Wade have hereunto subscribed our names as witnesses to the above and foregoing last will and testament of Frazier McLish at the request of the said Frazier McLish and in his presence and in the presence of each other on this 9th day of July, 1906.

James A. Cotner, George Cotner, W. Wade.

[fol. 103] Approved by me July 9, 1906. Thomas N. Robnett, U. S. Commissioner for the Southern District, Indian Territory, First Commissioner's District, in accordance with the Act of Congress of April 26, 1906. (Seal.)

Filed in open Court March 20, 1907. C. M. Campbell, Clerk, by Geo. F. Gates, Deputy.

Recorded in Exec. Record A, page 10.

PROOF OF WILL

UNITED STATES OF AMERICA,
Indian Territory,
Southern District, ss:

Personally appeared before me C. M. Campbell, Clerk of the United States Court in the Indian Territory and District aforesaid, James A. Cotner and George Cotner, both of Ardmore, I. T., and to me well know-, who being duly sworn say: That they and one W. Wade are the subscribing witnesses to the foregoing instrument of writing, purporting to be the last will and testament of Frazier McLish, deceased; that said instrument was executed at the time, place and by the person therein named; that said Frazier McLish the testator was at the time of signing said instrument upwards of 21 years of age, and of [fol. 104] sound and disposing mind and memory, and that in the presence of both of these affiants and W. Wade he declared to be his last will and testament, and subscribed his name thereto in the presence of W. Wade and both of these affiants; that at the request of said testator said affiants and W. Wade wrote their names to his said last will in his presence and in the presence of each other; that the subscriptions to the foregoing instrument of writing are genuine and

that said instrument which is hereto attached is the identical one that affiants so witnesses and saw the said Frazier McLish sign.

James A. Cotner. George Cotner.

Subscribed and sworn to before me this 20th day of March, 1907. C. M. Campbell, Clerk U. S. Court, Southern District Ind. Ter. (Seal.)

#463. Filed March 20, 1907. C. M. Campbell, Clerk, by Go. F. Gates, Deputy.
Recorded in Exec. Record A, page 10.

PROOF OF WILL

UNITED STATES OF AMERICA,
Indian Territory,
Southern District, ss:

Personally appeared before me C. M. Campbell, Clerk of the United States Court in the Indian Territory and District aforesaid, W. Wade [fol. 105] living 7 miles west of Madill, I. T., to me well known, who being duly sworn say: that he and James A. Cotner and Geo. Cotner are the subscribing witnesses to the foregoing instrument of writing, purporting to be the last will and testament of Frazier McLish deceased, that said instrument was executed at the time, place and by the person therein named; that said Frazier McLish the testator was at the time of signing said instrument upwards of 21 years of age and of sound and disposing mind and memory, and that in the presence of both of this affiant and James and Geo. Cotner he declared to be his last will and testament, and subscribed his name thereto in the presence of this affiant and other attesting witnesses, that at the request of said testator said affiant and James and Geo. Cotner wrote their name- to his said will in his presence and in the presence of each other; that the subscription to the foregoing instrument of writing are genuine, and that said instrument which is hereto attached is the identical one that affiant so witnessed and saw the said Frazier McLish sign.

W. Wade.

Subscribed and sworn to before me this 16th day of April, 1907. C. M. Campbell, Clerk U. S. Court, Southern District Ind. Ter., by Geo. F. Gates, Deputy. (Seal.)

#563. Filed April 16, 1907. C. M. Campbell, Clerk, by Geo. F. Gates, Deputy.
Recorded in Exec. A, page 10.

[fol. 106] RECORD UNITED STATES COURT IN THE INDIAN TERRITORY, SOUTHERN DISTRICT

23rd Day, March, 1907, Term

#563

In re Estate of FRAZIER McLISH, Dec'd

ORDER PROBATING WILL

Tuesday, Apr. 16, '07.

Now at this time it appearing to the court that the proof of the will of Frazier McLish deceased, has been d-ly made as is required by law.

It is therefore ordered by the court that said will be and the same is hereby ordered probated.

Recorded in Journal "C," page 372.

UNITED STATES OF AMERICA,
Indian Territory,
Southern District, ss:

IN THE UNITED STATES COURT IN THE INDIAN TERRITORY, SOUTHERN DISTRICT, A. D. 190-

APPLICATION FOR LETTERS TESTAMENTARY

Roberson Kemp now making application for Letters Testamentary on the estate of Frazier McLish solemnly swear- that he will make a true and perfect inventory of the estate and faithfully execute the last will and testament of Frazier McLish deceased, late of Emet in the Southern District aforesaid, that he will pay all the debts and legacies as far as the assets will extend and the law directs; that he will render just and true accounts of his administration or executorship [fol. 107] and faithfully perform all things required by law touching said executorship or administration so help me God.

Roberson Kemp.

Subscribed and sworn to before me this 17th day of April, 1907. C. M. Campbell, Clerk U. S. Court Southern District Indian Territory, by R. C. Fleming, Deputy. (Seal.)

#563. Filed April 17, 1907. C. M. Campbell, Clerk, by R. C. Fleming, Deputy.

Recorded Exec. Rec. A, page 10.

Executor's Bond

United States of America,
Indian Territory,
Southern District, ss:

Know all men by these presents that Roberson Kemp, as principal, and —— ——, as his sureties, are held and firmly bound unto the United States of America, in the penal sum of $1,000.00 for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

As witness our hands at Tishomingo, in the Indian Territory, this 17th day of April, 1907.

The condition of the above obligation is such, that the above [fol. 108] bounden Roberson Kemp was, by the last will and testament of Frazier McLish now deceased appointed executor thereof, the due execution of which will has been proven by the subscribing witnesses thereto, before United States Court, and said Roberson Kemp having accepted said appointment and filed his affidavit as such executor as required by law.

Now if the said Roberson Kemp shall make or cause to be made, a true and perfect inventory of all and singular the goods and chattels, rights and credits of his said testate, which have or may come to his hands possession or knowledge, or into the hands or possession of any other person for him as such executor, and shall return and exhibit the same in the office of the Clerk of the United States Court in the Indian Territory, Southern District within 60 days from the date of the above obligation, and if he, all and singular, the said goods and chattels, rights and credits which shall come to his hands, possession or knowledge, shall well and truly administer according to law, and pay the debts and legacies of said testate as far as his assets will extend and the law direct; and further make, or cause to be made, just and true accounts of his executorship, and make due and proper settlement thereof, from time to time, according to law or the lawful order, sentence or decree of any court having competent jurisdiction, and moreover well and truly do and perform all other matters and things touching the execution of said will that are or may be prescribed by law, or enjoined on such executor by the lawful order, sentence or decree of any court having competent jurisdiction; then the above obligation to be void and of no effect, otherwise to remain in full force and virtue.

[fol. 109]

Roberson Kemp, A. Boyd, C. J. Boyd.

United States of America,
Indian Territory,
Southern District:

We, A. Boyd, C. J. Boyd sureties on the within bond, do each of us solemnly swear that we are worth over and above our indebtedness and all liabilities and exemptions, the respective amount set opposite our names, and that our property is within the Indian Territory.

A. Boyd, $500.00. C. J. Boyd, $500.00.

Subscribed and sworn to before me this 17th day of April, 1907. C. M. Campbell, Clerk U. S. Court Southern District Ind. Ter., by R. C. Fleming, Deputy. (Seal.)

#563. Filed in open Court Apr. 17, 1907. C. M. Campbell, Clerk, by R. C. Fleming, Deputy.

Recorded in Exec. Record A, page 10.

[fol. 110] LETTERS TESTAMENTARY

UNITED STATES OF AMERICA,
Indian Territory,
Southern District, ss:

The President of the United States of America to all persons to whom these presents shall come, Greeting:

Know ye, that the last will and testament of Fraizer McLish of Emit, I. T., deceased, hath in due form of law been exhibited, approved and recorded in the office of the Clerk of the Court of Probate for the said District, a copy of which is hereunto annexed, and insomuch as it appears that Roberson Kemp has been appointed executor in and by said last will and testament to execute the same, and to the end that the property of the testator may be preserved for those who shall appear to have a legal right or interest therein, and that the said last will may be executed according to the request of the testator we do hereby authorize him, the said Roberson Kemp as such executor to collect and secure all and singular the goods and chattels, rights and credits, which were of the said Frazier McLish at the time of his death, in whosoever hands or possession the same may be found, and to perform and fulfill all such duties as may be enjoined upon him by said will so far as there shall be property and the law charge him, and in general to do and perform all the acts which now or hereafter may be required of him by law.

Witness the Honorable Hosea Townsend, Judge of the United States Court for the Southern District of the Indian Territory, and the seal thereof at Tishomingo, in the Indian Territory, this 17th day of April, 1907.

C. M. Campbell, Clerk, by R. C. Fleming, Deputy. (Seal.)

[fol. 111] Recorded in Executor's Record "A," page 10.

RECORD UNITED STATES COURT IN THE INDIAN TERRITORY, SOUTHERN DISTRICT

24th Day, March, 1907, Term

Pro. 653

In re Estate of FRAZIER MCLISH, Dec'd

Wednesday, April 17, 1907.

It is ordered by the Court that Roberson Kemp, be and he is hereby appointed executor of the last will and testament of Frazier

McLish, deceased, and the bond of said Roberson Kemp which is hereby fixed at $1,000.00 is hereby duly approved.

Recorded in Journal "C," page 390.

[fol. 112] Thursday, Sept. 24, 1908.

No. 563, U. S.

In re Estate of FRAZIER MCLISH, Deceased, ROBERSON KEMP, Administrator

THOS. N. ROBNETT, appearing in open Court and being duly sworn, testifies as follows:

What is your residence?
Ardmore, Oklahoma.
Where did you live on the 9th day of July, 1906?
Ardmore.
Did you hold any official position at that time?
I was United States Commissioner for the Southern District of the Indian Territory.
Did you know Frazier McLish in his life time?
I did.
I will ask you to examine that will filed March 20, 1907, by C. M. Campbell, Clerk of the U. S. Court So. Dist. I. T. (handing will to witness). Did Frazier McLish present this will to you for approval on the 9th day of July, 1906?
He did.
At that time did you not take his acknowledgment in execution of that will?
I did, after reading the will over to him and after going somewhat into detail to explain the contents and the purpose for which it was made.
After you had read it over and explained it to him did you not ask him if he executed it for the purposes and considerations men-
[fol. 113] tioned in it?
His answer was that he executed it for the purpose and considerations mentioned in the will.
Now, will you explain to the court the circumstances under which this acknowledgment was taken, and how it came that your certificate of acknowledgment was not attached to the will?
At the time these parties came in I was trying a case as United States Commissioner at Ardmore, and there was a lull in the proceedings in some way and they presented the matter to be acted upon, and I took the matter up and read the will over and Mr. McLish acknowledged it, and I laid it aside then or passed it for a few moments and it was not brought up any more and leaving off the certificate is wholly a clerical error on my part in not attaching it.

Nick Wolfe, County Judge.

#563. Filed Sept. 24, 1908. C. Baker, Clerk.

[fol. 114] STATE OF OKLAHOMA,
County of Johnston, ss:

CERTIFICATE

The undersigned lawfully bonded abstracters within and for above named county and state hereby certify that the foregoing mentioned sheets from No. one to 14 both inclusive, including the caption sheet hereof, contains full and forrect copies of the Court proceedings in the matter of the estate of Frazier McLish, deceased, Probate No. 563, Robinson Kemp, Administrator, as the same appears on file and of record in the office of the Court Clerk of Johnston County, Oklahoma, which office contains the court records of the Tishomingo Division of the Southern District of the Indian Territory at Tishomingo, Oklahoma, this is full court proceedings in above numbered cause except two reports of administrator filed Aug. 12, 1908, and Sept. 24, 1909, respectfully, which are not shown herein.

In testimony whereof witness our hand by R. E. Rutherford, a member of said firm, duly authorized hereunto this 13th day of November, 1920, at 11:30 o'clock A. M.

Tishomingo Abstract Company, Bond Abstracters, by R. E. Rutherford, a Member of said Firm.

[fol. 115] ARGUMENT OF COUNSEL

Mr. Rider, of counsel for McLish heirs: Of course we admit, Mr. Wilkins, as I agreed these were true copies of the instruments therein purported to be shown, however, I reserved the right to object on the ground they are incompetent, irrelevant and immaterial in this case for the reason these are full blood Indians, all these defendants except myself, and the will upon its face does not show that it was executed in compliance with the Act of Congress of April 26, 1906, which was in force at that time, it does not show upon its face it was acknowledged before a United States officer, Commissioner, or District Judge, or any other officer of any kind whatsoever. For those reasons we object to it being considered as evidence in this case.

Now the Act of Congress of April 26, 1906, reads as follows:

"Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United [fol. 116] States Commissioner."

And one of my objections to the will is it does not show it was acknowledged before a United States Commissioner or District Judge.

It does show a part of it—it does say approved, but the act says "—acknowledged before and approved by—"

Further objection, the proof which has been offered, which was offered before the United States Probate Court in probating the will does not show the United States Commissioner was one of the witnesses examined before that court, does not show he was a witness before that court, or his testimony taken. The will was probated upon the testimony of the two Cotner's and Wade, and not upon the testimony of the Commissioner.

Another objection is that irrespective of whether it is valid or invalid it does not effect the dower rights of Millie McLish, the widow of the deceased, Frazier McLish, under the Arkansas law in force at that time.

The Court: I will overrule the objections and give you an exception.

Mr. Rider, of counsel for McLish heirs: We offer an objection to the testimony of Judge Robnett given after statehood in 1908, it does not show to have been given in any court where the estate was pending, and we object to it, and further object for the reason that [fol. 117] Judge Robnett is personally present in Court at this time.

The Court: The court withholds ruling at this time on that objection.

T. N. Robnett, called as a witness, having been duly sworn as provided by law, testified as follows:

Direct examination,

By Mr. Eddleman, of counsel for defendants, J. A. White and Annie White:

Q. State your name.
A. T. N. Robnett.
Q. Where do you live?
A. At Davis, Oklahoma.
Q. You occupy any official position about the 9th day of July, 1906?
A. Yes, sir, United States Commissioner for the Southern District of the Indian Territory at Ardmore.
Q. Did you know Frazier McLish during his lifetime?
A. Yes, sir.
Q. I will ask you if you remember of Frazier McLish ever presenting to you for your approval and taking his acknowledgment to a will?
A. Yes, sir, I do.
[fol. 118] Q. At that time state whether or not—I will get you to examine that certified copy of the will and I will ask you if that is the will, best of your judgment he presented to you at that time?
A. Yes, sir, I think that is a copy of the ins*y*rument.

Mr. Rider, of counsel for McLish heirs: We object to that, it is leading and suggestive.

The Court: Sustained.

Q. State what took place when he brought that in and presented it to you?

A. I was holding Commissioner's Court in that old two-story building adjoining the court room there and the weather was very warm—there was a lull in the business and Cotner and Wade brought this will in.

Q. Frazier McLish with them?

A. Yes, sir, and we talked it over and I read it to Frazier and among other things I asked him if he understood it.

Mr. Rider, of counsel for McLish heirs: We object to the testimony of this witness. It is, as I understood it for the purpose of showing this acknowledgment of this will before him. It is incompetent, irrelevant and immaterial and you can show an acknowledgment of that kind only by a proper certificate on the will itself, this testimony is incompetent at this time.

The Court: Objection overruled.

[fol. 119] Mr. Rider, of counsel for McLish heirs: We except.

Q. Proceed.

A. After I had read the will over to Frazier and it was signed—I think I was waiting on some witnesses there in court, sitting around there any way—I signed up the will as it is in that instrument there, and I think "by me" was left out inadvertantly.

Mr. Rider, of counsel for McLish heirs: We object to that.

Q. What were the words inadvertantly left out?

A. "Acknowledged and approved by me," should have been acknowledged and approved by me up in the will here and that was left out.

Q. State to the court whether or not at the time Frazier McLish presented that will to you he acknowledged it?

A. He did.

Mr. Rider, of counsel for McLish heirs: We object if the Court please.

The Court: Overruled.

Mr. Rider, of counsel for McLish heirs: We except.

Q. You read the will over to him?

A. Yes, sir.

Q. You explained it to him?

A. Yes, sir.

Q. You explain to the court what questions, if any, you asked him?

A. Nothing further that the general propositions, if he knew the [fol. 120] effect of it, that it gave to this lady all the rights of his, etc.

Q. What was his answer to that?

A. That was the intention at that time.
Q. You acquainted with Frazier McLish?
A. Yes, sir.
Q. State to the court whether or not he was an unusual intelligent full blood.
A. He was reasonably well informed for a full blood, yes, sir, was intelligent.
Q. You did not put the acknowledgment on that on account of business before your court and the will was taken away?
A. Yes, sir, rush of business right then, it was taken away I put the seal on it I think.
Q. Afterwards you appeared before the County Court of Johns-on County where your testimony was taken for the purpose of making it a matter of record in the administration of Frazier McLish's estate?
A. Yes, sir.
Q. That a copy of the testimony taken before Judge Wolf at that time?
A. Yes, s-r.
Q. You know the official position of Judge Wolf at that time?
A. Yes, sir, County Judge.
Q. That was in September, 1908?
A. I don't remember the date.
Q. Could you say whether or not your testimony was ever taken on any other occasion with reference to this matter?
A. I don't have any remembrance of it.
[fol. 121] Q. Don't know whether it was or not?
A. I don't know. I don't remember it, at this time that is the only time I remember.
Q. You did endorse your approval on this will?
A. Yes, sir.
Q. You put no certificate of acknowledgment on it, please explain that—why that was?
A. By me in the rush of business inadvertantly left off. We were waiting for witnesses and they took the will away and I had no interest in the will. At that time the commissioner did not charge a fee for it, did not get anything for the work at all, he was not interested except to see the Indian's rights were protected and after I looked over that to see he was not being imposed on, etc., why I was at ease in the matter.

Cross-examination.

By Mr. Rider, of counsel for McLish heirs:

Q. You looked into the matter of his not being imposed upon? Yet you knew at that time he had a wife and three children?
A. I think he told me he had a wife.
Q. And three children?
A. Said he was not living with his wife.
Q. Say anything about the children?
(No answer.)

Q. What investigation did you make to see whether he was being imposed upon or not?

A. I mean that no trick was being put up on him.

[fol. 122] Q. You make any investigation as to—to see whether it was a free will as to his own?

A. Well.

Mr. Eddleman, of counsel for defendants Whites: We object.

The Court: Sustained.

Q. You examined before Wolf, that was after statehood?

A. Yes, sir.

Q. And this will you have stated was signed in that way, and you approved it on the 9th day of July, 1906? That was two years before you testified at Tishomingo?

A. Yes, sir.

Q. This is 1922, and your recollection as to what took place when it was brought in there was better in 1908 than now?

A. Yes, sir, might have been.

Q. This your testimony before Judge Wolf? (Exhibiting testimony.)

A. Yes.

Q. After you read it over you explained it to him did you or not ask him if he executed it for the purposes and considerations mentioned, and his answer was that he executed it for the purposes and considerations therein mentioned, and that — what you testified to?

A. Yes, sir.

Q. Then what took place?

A. Yes, sir, absolutely that is right.

Q. This Act under which you acted had just gone into effect?

[fol. 123] A. Yes, sir, sometime in 1906.

Q. Act of April 26, 1906?

A. Yes, sir.

Q. And you acted in this matter in July afterwards?

A. Yes, sir.

Q. Had you seen a copy of the Act at that time?

A. Yes, sir, we kept up with those things. We had to keep up with them.

Q. They did not inspect you on things like this?

A. I remember having then examined that Act of Congress and talked with Judge Townsend about it.

Q. You remember when that was?

A. After the Act passed.

Q. Afterwards?

A. Yes, sir, after it passed, his instructions were to me to be very careful in the approval of those wills, that he would adopt that policy.

Q. I will ask you further, referring to the facts as to what you testified to in 1908, did you state than that you left off the certificate of acknowledgment through error?

A. I state that now.

Q. You don't mean to say you left out the words "acknowledged before me," but left out the words, "he appeared before me and ex-

cuted the same for the purposes and considerations therein mentioned"?

A. That is what I state now.

[fol. 124] Redirect examination.

By Mr. Eddleman, of counsel for defendants Whites:

Q. Counsel asked you if you had seen that bill. I will ask you if it was not a fact at that time when a special bill passed in Congress that you got a copy right away, and the attorneys down here in this part of the country got a copy?

A. I don't remember.

Q. And that was a fact as to Acts of Congress all over the Country that both sides received copies, and were getting copies of that kind of matter all the time.

(No answer.)

Witness excused.

[fol. 125] Argument of Counsel

Mr. Eddleman, of counsel for defendants J. A. and Annie White: We offer in evidence a relinquishment of dower executed by Mrs. Millie McLish to Julia Kemp, dated the 23rd day of May, 1907, witnessed by Chas. Calhoun, D. B. Williford and John Pickens, Interpreter and acknowledged before J. I. Henshaw, Notary Public, on the 23rd day of May, 1907, and filed for record May 31, 1907, and is recorded in Vol. E, page 493, records of the County Clerk's office of Love County, Okla.

Mr. Rider, of counsel for McLish heirs: We object, incompetent, irrelevant and immaterial, and further claim the proof already introduced before this Court shows the party who executed it to be a full blood duly enrolled Chickasaw Indian, and there is no approval of the deed by the Secretary of the Interior, or any other duly authorized authority, but a bare instrument executed by this woman. It is not binding on her as to relinquishing her dower or for any other purpose.

The Court: Objection overruled, let the deed go in.

Mr. Rider, of counsel for McLish heirs: We except to the ruling of the Court.

[fol. 126] Exhibit in Evidence

Quitclaim Deed with Relinquishment of Dower and Homestead

United States of America,
Southern District,
Indian Territory:

This Indenture made the 23rd day of May, 1907, by and between Millie McLish, widow, of Lebanon, Ind. Ter., party of the first part, witnesseth:

That the said party of the first part for and in consideration of the sum of One Dollar in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged and the said party of the second part forever released and discharged therefrom and the further consideration that in his last will and testament made on the ninth day of July, 1906, Frazier McLish gave, bequeathed and devised unto said Julia Kemp all his property, both personal and real, except one Dollar ($1.00) to be paid to myself and to each of the other members of said Frazier McLish's immediate family, said one Dollar ($1.00) to myself having been paid by said Julia Kemp, it being the will of said Frazier McLish, decea-ed, that said Julia Kemp should be the sole beneficiary of his said will except as herein above recited and said Julia Kemp having fully complied with all conditions imposed upon her in said will, have remised, released, sold, conveyed and quit claimed, and by these presents do remise, release, sell, convey and quit claim unto the said party of the second part her heirs and assigns forever, all the right, title and interest, claim, demand and possibility of dower and homestead which first party may now or hereafter have in and to the following described parcels of land, to-wit:

The N. E. ¼ of the N. E. ¼ of the N. E. ¼ and the S. ½ of the N. ½ of the N. E. ¼ and the N. ½ of S. ¼ of the N. E. ¼ *of the*, and the N. ½ of the S. ½ of the N. W. ¼ and the S. ½ of the [fol. 127] S. W. ¼ of N. W. ¼ and S. W. ¼ of S. E. ¼ of N. W. ¼ of Section One, Twp. 9 south, Range 1 East, Chickasaw Nation, containing 160 acres, more or less, also the entire homestead allotment of Frazier McLish, deceased, all in the Chicasaw Nation Indian Territory, also all other allotments in the Choctaw-Chickasaw Nations which have been made or may hereafter be made to said Frazier McLish, deceased, and all moneys or annuities which are or may become due said Frazier McLish from the United States or from the Choctaw or Chickasaw Nations.

To have and to hold the same together with all and singular the appurtenances and privil-ges thereunto belonging, or in anywise appertaining, and all the estate, right, title, interest and claim whatever of the said party of the first part either in law or equity to the only proper use, benefit and behoof of the said party of the second part, her heirs and assigns forever.

And the said party of the first part hereby expressly waives, releases and relinquishes unto the said party of the second part, her heirs, executors, administrators and assigns, all right, title, interest and benefit whatever in and to the above described premises and annuities and each and every part thereof which is given by or results from all laws of the United States or the Choctaw or Chickasaw Nations or treaties between the United States and the Choctaw Nation or Chickasaw Nation pertaining to the exemptions of dower or homestead, or that first party has acquired by reason of the said will of the said Frazier McLish.

And the said parties of the first part for myself and my heirs,

executors and administrators, do covenant, promise and agree to and with the said party of the second part, her heirs, executors, administrators and assigns that they have not made, done, committed, exe- [fol. 128] cuted nor suffered any act or acts, thing or things whatsoever whereby, or by means whereof the above mentioned and described premises or any part or parcel thereof now are, or at any time hereafter, shall or may be impeached, charged or incumbered in any way or manner whatever.

In Witness whereof the said party of the first part hereunto sets her hands and seal this the 23rd day of May, 1907.

Millie McLish, Widow. (Her x mark.)

Signed, sealed and delivered in presence of Chas. Calhoun, D. B. Williford, John Pickens, Interpreter.

UNITED STATES,
Indian Territory,
Southern District:

I, J. I. Henshaw, Notary Public, in and for the Southern District, Indian Territory, do hereby certify that Millie McLish a widow, being personally made known to me as the same person whose name is subscribed to the foregoing instrument of writing appeared before me this day in person and acknowledged that she had signed, sealed and delivered the said instrument of writing as her free and voluntary (deed) act and that she had freely and voluntarily relinquished her dower and right of homesteads and all rights which had accrued to her by reason of the will of Frazier McLish, deceased, for the uses and purposes and considerations therein mentioned without undue influence of said Frazier McLish, deceased, or any one else, and that she does not wish to retract the same.

[fol. 129] Given under my hand and official seal this the 23rd day of May, 1907.

J. I. Henshaw, Notary Public. My commission expires on the 5th day of May, 1911. (Seal.)

Filed for record at Marietta, May 31, 1907, at 9 a. m. H. G. House, Deputy Clerk and ex officio Recorder, District No. 26, Ind. Ter. $1.25 pd.

Recorded in Vol. E, page 493, Records of said County.

ARGUMENT OF COUNSEL

Mr. Eddleman, of counsel for J. A. and Annie White: We next offer in evidence a deed from Julia Kemp to J. A. White, conveying the lands in controversy, filed November 25, 1907, and recorded in Book 1, page 12, deed records office of the County Clerk, Love County, Oklahoma, consideration twelve hundred and eighty dollars.

Mr. Rider, of counsel for McLish heirs: We object, incompetent, irr-levant and immaterial, and further claim the proof already introduced before this court shows the party who executed the deed to Julia Kemp to be a full blood Indian, and therefore she derived no title. It is not binding on her and therefore could not effect her dower rights here.

[fol. 130] The Court: Overruled.

Mr. Rider, of counsel for McLish heirs: We except.

EXHIBIT IN EVIDENCE

Warranty Deed

Know all men by these presents that Julia Kemp, joined by her husband Roberson Kemp of Emit, Indian Territory, for and in consideration of the full sum of Twelve Hundred and Eighty ($1,280) Dollars, $165.00 cash in hand paid, and one note for $290.00 due Jan. 1, 1908, one note for $265.00 due Jan. 1, 1908, and one note for $650.00 due Nov. 1, 1908, the receipt whereof is hereby acknowledged, do hereby grant, bargain, and sell unto J. A. White of Marietta, I. T., and his heirs and assigns the following described real property, lying and situate in Indian Territory, and more fully described as follows, to wit:

The N. E. ¼ of the N. E. ¼ of the N. E. ¼ and the S. ½ of the N. ½ of the N. E. ¼ and the N. ½ of the S. E. ¼ of the N. E. ¼ and the N. ½ of the S. ½ of the N. W. ¼ and the S. ½ of the S. W. ¼ of the N. W. ¼ and the S. W. ¼ of the S. E. ¼ of the N. W. ¼ of Section 1, Twp. 9 south, range 1 east, Chickasaw Nation,

containing 160 acres, more or less, according to the United States survey thereof, the same being the surplus allotment of Frazier McLish, deceased, with all the privileges, appurtenances and improvements hereunto belonging or in any wise appertaining.

To have and to hold the aforegranted premises unto the said J. A. White and his heirs, and assigns in fee simple forever and I, the said [fol. 131] Julia Kemp for myself and my heirs, executors, and administrators do covenant with the said J. A. White, and his heirs and assigns that I am lawfully seized in fee simple of the aforegranted premises, that they are free from all incumbrances; that I have a good and perfect right to sell and convey the same unto the said J. A. White as aforesaid that I will, and my heirs, executors and administrators shall warrant and defend the same to the said J. A. White and his heirs — assigns forever against the lawful claims and demands of all persons.

It is understood that the title to all aforesaid lands shall be and remain in said Julia Kemp her heirs, executors, successors or assigns until all the aforementioned notes with the interest thereon shall have been paid in full, and that in case of default of payment of any one of said notes at maturity said Julia Kemp her heirs, successors or as-

signs or the holders of said notes may take possession of said lands and for the consideration and purposes above set out and for divers other good and valuable considerations, I Roberson Kemp husband of the said Julia Kemp do hereby release and relinquish and quit claim unto the said J. A. White, and his heirs and assigns all of my right, title, claim or possibility of interest by courtesy or otherwise in or out of the aforesaid premises.

In witness whereof we the said Julia Kemp and Roberson Kemp have hereunto set our hands this the 15th day of November, A. D. 1907.

Julia Kemp (her X mark), Roberson Kemp.

Witnesses to mark: Pearl Milburn, Isaac Alberson.

[fol. 132] INDIAN TERRITORY,
Central District:

Be it remembered that on this the 15th day of November, A. D. 1907, before me the undersigned a duly commissioner*ed* and acting Notary Public, within and for the District and Territory aforesaid appeared in person Roberson Kemp to me well known to be the person who signed the above and foregoing deed of conveyance as one of the parties grantor and after said instrument read over to him he acknowledged to me that he had executed the same for the consideration, purposes, and uses therein mentioned and set forth and I do hereby so certify.

And *it* further certify that on this day voluntarily appeared before me Julia Kemp wife of the said Roberson Kemp to me well known as the person whose name appears upon the within and foregoing deed of conveyance and in the absence of her said husband, declared that she had of her own free will executed said deed and signed the relinquishment of dower and homestead therein contained for the consideration, purposes and uses therein mentioned and set forth without compulsion or undue influence of her said husband.

In testimony whereof witness my hand and official seal this the day and year last above written.

C. T. Luttrell, Notary Public, Central District, Indian Territory. My commission expires Mar. 22, 1908. (Seal.)

Filed for record Nov. 25, 1907, 3.30 p. m. Recorded in Vol. 1, W. D., on page 12. J. D. Garrett, Register of Deeds, by Ama Symon, Dpty.

[fol. 133] J. A. WHITE, being duly sworn as provided by law, testified as follows:

Direct examination.

By Mr. Eddleman, of counsel for defendants Whites:

Q. You the J. A. White who is the defendant in this suit?
A. Yes, sir.

Q. I believe you purchased this land from Julia Kemp?
A. Yes, sir.
Q. November 15, 1907, that the time you purchased it?
A. Yes, s-r.
Q. You go into possession at that time?
A. It was about a year, there was a lease on the land, it did not expire for a year, it was a year before the lease expired.
Q. The deed is dated November 15, 1907, when did you go into possession?
A. January 1st, 1909.
Q. State whether or not you have been in possession ever since?
A. Yes, sir.
Q. State to the court what consideration you gave for that land?
A. Twelve Hundred Eighty Dollars.
Q. I will get you to state whether or not since you purchased it and been in possession of it you have made improvements on it?
A. Yes, sir, I have.

Mr. Rider, of counsel for McLish heirs: We object.
The Court: Sustained as to that.

[fol. 134] Q. I will ask you if at the time you purchased this land you had any notice or information that Millie McLish or the three McLish girls claimed any interest in this land?
A. No, sir, I did not.

Mr. Rider, of counsel for McLish heirs: We object to that.
The Court: Sustained.

Q. When did you first learn that these co-defendants of yours in this case claimed any interest in this land?

Mr. Rider, of counsel for McLish heirs: We object, that is immaterial.
The Court: Yes, sustained.

Q. When was the first time you ever learned that Millie McLish, Rosie Williford, Alice Williford and Allie Griffin and George F. Rider claimed any interest in this property?

Mr. Rider, of counsel for McLish heirs: We object for the reason we think that is immaterial.
The Court: Let him answer.

A. A short time before this suit was filed.
Q. A short time before this suit or the other suit?
A. The first suit.
Q. You had then been in possession under your deed up to that time?
A. Yes, sir.
[fol. 135] Q. And still are?
A. Yes, sir, I don't know how long it was before, two or three months.
Q. Prior to the ime you had that information you expended

money and made improvements on this property?
A. Yes, sir, I did.

Mr. Rider, of counsel for McLish heirs: We object.
The Court: Sustained.

Witness excused.

[fol. 136] Mr. Eddleman, of counsel for J. A. and Annie White: We rest.

Mr. Wilkins, of counsel for plaintiff: The plaintiff is through.

Mr. Rider, of counsel for McLish heirs: We are through.

By Mr. Wilkins, of counsel for Plaintiff: Comes now the plaintiff and moves for judgment on the notes sued on and for the foreclosure of his lien on the property described in the mortgage as prayed for in plaintiff's petition as against all of the defendants.

[fol. 137] In District Court of Love County

[Title omitted]

Opinion—Filed Apr 10, 1923

This case was submitted upon an agreed statement of facts supplemented by oral testimony, and on the submission the defendants, Millie McLish, Allie Williford, Alice Griffin, Rosie Williford and George F. Rider, assumed the burden in the argument, they having admitted that if the will of Frazier McLish, deceased, is a valid will the title of the defendant, J. A. White, and the mortgage of the plaintiff, S. H. Davis, are valid and that plaintiff would be entitled to judgment foreclosing his mortgage. After argument was completed, by agreement of all parties the matter was submitted to the Court and taken under advisement until briefs could be prepared and filed by all parties, and it was to be thereafter passed upon by the Court upon the oral arguments and briefs submitted.

The defendants, except J. A. White and Annie White, have presented and briefed the case under three propositions:

First. "It is the contention of the widow and heirs of Frazier McLish, deceased, that the will relied upon by the plaintiff and the defendant, J. A. White, is void because not executed in accordance with the Act of Congress of April 26, 1906."

Second. "That the evidence in this case does not show that Frazier McLish at the time of the execution of said will had testamentary [fol. 138] capacity, and that said evidence does not show publication of said will by decedent."

Third. "That if the will is valid and executed in accordance with the acts of Congress she should be endowed, nevertheless, with one third of said lands for life."

The will in question was executed by Frazier McLish and attested as required by the laws of the State of Arkansas and bears upon it the following endorsement: "Approved by me July 9, 1906, Thomas N. Robnett, U. S. Commissioner for the Southern District, Indian Territory, First Commissioner's Dist., in accordance with the Act of Congress of April 26, 1906," and the will was duly admitted to probate by the United States Court for the Southern District of the Indian Territory on the 16th day of April, 1907.

In support of the first proposition the case of Proctor v. Harrison, 34 Okla., 181; 125 Pac. 479, is chiefly relied upon by the defendants, and it appears to be the only case in which the exact question here raised has been before the Court. This decision, however, is of very little assistance in the determination of the question here involved for the reason that in that case the United States Commissioner endorsed upon the will a complete certificate of acknowledgment such as was required for the acknowledgment of deeds under the laws of Arkansas, and added thereto his approval of said will. In passing upon the approval so endorsed the Supreme Court used this language: "It is not necessary to say anything further concerning this position (the contest of said will by the widow), as it is so manifest that the acknowledgment comes within the purpose of the statute that argument cannot make it clearer." If the will in that case had borne [fol. 139] merely the certificate of acknowledgment, and the endorsement of approval by the Commissioner had been omitted and under such a state of facts the Supreme Court had held the acknowledgment of the will a full compliance with the Federal Statute, then the decision would have been conclusive upon the proposition here involved, because in such a case it would be clearly demonstrated by the Supreme Court's construction of the Act that acknowledgment was the sine qua non to the validity of a full blood will and not its approval by the commissioner.

In the instant case the approval of the commissioner was endorsed upon the will with the proper date and with the written statement of the commissioner that it was done in accordance with the act of Congress of April 26, 1906. Said Act of Congress provides: "Any person of lawful age and sound mind may be last will and testament devise and bequeath all his estate, real and personal and all interest therein: provided, that no will of a full blood Indian devising real estate shall be valid if such last will and testament disinherits the parent, wife, spouse or children of such full blood Indian unless acknowledged before and approved by a Judge of the United States Court *ofr* the Indian Territory or a United States Commissioner." The act nowhere prescribed a form of acknowledgment, and in my opinion the object and purpose of the act was to prevent fraudulent imposition upon the full blood Indians by requiring them to appear before a United States Commissioner or a Judge of the United States Court and tender the instrument itself to the officer for inspection, [fol. 140] who thereupon could make any investigation which he deemed the circumstances of the case might require in order to determine whether or not the will so executed and submitted for ap-

proval was the free and voluntary act of the testator and made with a full knowledge of the terms, conditions and effect of the same.

In my opinion the requirement for the acknowledgment before the designated officer was placed in the congressional act, not for the purpose of having a certain form of certificate endorsed thereon, but that the Indian might be required to come in person before the officer and request his approval. The word "acknowledgment" is not synonymous with the term "certificate of acknowledgment," and the word "acknowledged," as used in the Act, does not, in my opinion, connote "certificate of acknowledgment" reasonably or necessarily.

We have numerous instances in the law where the word acknowledge, or some form thereof, is used when a certificate, such as is required to a deed, is not contemplated and is seldom resorted to. The law provides that illegitimate children may inherit from the person who in writing acknowledges himself to be the father, but no form of certificate is required, and the nature and character of proof sufficient to sustain the acknowledgment varies with the circumstances of each particular case. The law provides that a debtor may acknowledge a debt which has been barred by th- statute of limitation and thereby revive his original obligation, but nowhere fixes the form of certificate of such acknowledgment, and the character and degree of proof of such acknowledgment depends upon the circumstances of [fol. 141] each case. The law provides that a person may in writing assume the obligation of another and thereby become liable, but no certificate of acknowledgment is prescribed and the character and sufficiency of the proof necessary to establish the acknowledgment of liability varies with the circumstances of each particular case. Ratification, waiver and adoption are similar instances in the law where acknowledgment may fix liability although no prescribed form is required ther-for, and the character and sufficiency of the proof to establish the same varies with each particular case. The question always is, did the person whose acts, or acknowledgment, or admissions are relied upon to fix liability act or acknowledge or make the admission with full knowledge of the facts. In my opinion these were matters to be passed upon and determined by the Judge of the United States Court, or by the United States Commissioner to whom a full blood will might be submitted, and if he was satisfied that the will was executed with a full knowledge of the terms and effect then the purpose of Congress in the protection of the full blood Indian was accomplished and it became the duty of such officer, as the designated Federal Agency, to endorse his approval in writing upon the will. This was done in this case, and I think the language used was sufficient to satisfy the requirements of the Act.

Under the second proposition, the will having been admitted to probate, it is conclusively presumed that the Court having jurisdiction of the probate of said will determined the testamentary capacity of the testator and that question is therefore concluded in this case. [fol. 142] As to the third contention that the widow is entitled to dower in the lands devised by Frazier McLish although the Court should hold the will valid, I think there are two insuperable objections to this contention. The widow, with full knowledge of the

terms of the will, elected to take thereunder and executed her receipt for the bequest left her. In the next place the defendant J. A. White purchased this land in November, 1907, prior to statehood, and went into possession thereof, and has been in notorious and peaceable possession since that time claiming to be the owner thereof, and with his muniment of title of record. I think, therefore, that the widow's claim to dower is barred by the statute of Limitation, and that she is guilty of laches and not entitled to recover herein.

I therefore conclude upon the whole case that the plaintiff should recover judgment foreclosing his mortgage as prayed for in his petition, that the defendant J. A. White should recover judgment as against the other defendants and cross-petitioners quieting his title to the lands in controversy, and that the defendants and cross petitioners should take nothing by reason of their cross petitioners *should take nothing by reason of their cross petition* herein. Let the journal entry be prepared in conformity herewith.

B. C. Logsdon, District Judge.

[File endorsement omitted.]

[fol. 143] In District Court of Love County

[Title omitted]

Judgment and Decree—Filed April 10, 1923

Now on this 10th day of April, 1923, the above entitled cause coming on regularly for hearing and the plaintiff appearing by his attorney- T. B. Wilkins and W. Wallace Greene, the defendants, J. A. White and Annie White appearing by their attorney A. Eddleman, the defendants Alice Williford, Allie Griffin, Rosie Williford, and Millie McLish appearing by their attorney George F. Rider, and the defendant George F. Rider appearing in person.

The defendants and each of them having been duly and personally served with summons herein, said summons and return of service by the Sheriff is now by the Court examined and approved and declared legal and valid and the said plaintiff and defendants announcing ready for trial and by agreement of the plaintiff and defendants and with the consent of the court the trial of this cause by a jury is waived; that after reading the pleadings and hearing and examining the evi-
[fol. 144] dence submitted by the plaintiff and defendants and hearing the arguments of counsel this cause is by agreement of the parties taken under advisement until the said plaintiff and defendants might submit briefs and written arguments herein and now on this day this cause coming on regularly again the court after considering the evidence and briefs, examining the pleadings herein finds that the court has full and complete jurisdiction of the subject matter of this litigation and all the defendants and each of them and that the parties appeared personally and announced ready for trial and the court being well and fully advised in the premises finds that all the allegations

and averments contained in the petition herein filed by plaintiff and in the reply filed by said plaintiff to the answer filed by the defendants Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and George F. Rider are true. The Court finds that there is due plaintiff on the notes and mortgage sued on herein executed by the defendants J. A. White and Annie White, his wife, One Hundred Twenty ($120.00) Dollars with interest on said sum from the 1st day of February, 1921, at the rate of ten (10) per cent per annum, and further sum of One Hundred Twenty ($120.00) Dollars with interest thereon from the 1st day of February, 1922, at the rate of ten (10) per cent per annum, forty and No/100 ($40.00) Dollars which sum bears interest from this date at the rate of ten (%10) per cent per annum and that said mortgage provides on its face that in case of default and failure of the said defendants to comply with any of the conditions of said notes and mortgage given to secure the payment of the same this plaintiff should be entitled to recover of and from said defendants a reasonable attorney's fee to become due and payable upon the institution of any suit thereon that the court now finds that [fol. 145] fifty ($50.00) dollars is a reasonable fee in the premises.

The Court further finds that the said defendants J. A. White and Annie White, his wife, on or about the 24th day of January, 1920, made, executed and delivered to plaintiff S. H. Davis, the promissory notes herein referred to and described in the first and second count of plaintiff's said petition and that at the same time and place and for the purpose of securing the payment on said indebtedness, the said defendants J. A. White and Annie White, his wife, made, executed and delivered to said plaintiff their certain mortgage deed in writing whereby they conveyed to him the

Northeast quarter of the northeast quarter of the northeast quarter and the south half of the north half of the northeast quarter and the north half of the south half of the northeast quarter of Section One, Township Nine South, Range One East in Love County, Oklahoma,

and that plaintiff has a lien on said premises by virtue of the mortgage set out in said petition and herein referred to, to secure the payment of said indebtedness, interest and cost, and that said mortgage contains the words: "appraisement waive," and provides that a reasonable attorney's fees shall be allowed in the event of foreclosure thereof and said mortgage is duly recorded in the office of the county clerk of Love County, Oklahoma, in Book 15, page 590, in the records of said county.

The court further finds that the said mortgage constitutes a valid lien upon the lands above described to secure the payment of said indebtedness, interest, costs and attorney's fees, subject only to the lien of a prior mortgage on said premises, securing a principal indebtedness of twenty four hundred $2,400.00 dollars and interest thereon. [fol. 146] It is therefore ordered, adjudged and decreed by the Court that the said plaintiff S. H. Davis do have and recover of and from the said defendants J. A. White and Annie White, his wife, the sum of two hundred eighty and No/100 Dollars with interest thereon

from date hereof at the rate of ten per cent per annum and a further sum of fifty dollars attorney's fees and for costs herein.

The Court further finds that the lands and premises herein described and described in plaintiff's petition were allotted to one Frazier McLish who died testate on or about the 10th day of February, 1907, leaving a will bearing date on or about the 9th day of July, 1906, by which the premises herein described were devised to one Julia Kemp from whom title comes to the defendants J. A. White and Annie White, his wife.

The Court further finds that the said will of the said Frazier McLish was acknowledged before and approved by the Honorable Thomas N. Robnett, United States Commissioner for the Southern District of Indian Territory on the 9th day of July, 1906, and that said approval is in all respects as required by the Act of Congress and said will is legal and valid and passed all of the right, title and interest of the said devisor in and to said premises to the said Julia Kemp.

The Court further finds that the defendants Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and George F. Rider have no right, title, interest, estate, lien, claim or demand at law or in equity of, in, to or against said premises being the lands and tenaments herein described or any part thereof or any interest therein.

[fol. 147] The Court further finds that the said defendant Millie McLish has no right of dower or other interest in or to said premises or any part thereof by reason of being the surviving widow of the said Frazier McLish or otherwise, and the title to said premises is now quieted, determined and established in the defendants J. A. White and Annie White, his wife against the defendants Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and George F. Rider and each of them, subject to the lien of plaintiff's said mortgage; that they and each of them are restrained and enjoined from asserting or setting up any right, title, interest, estate, or lien, claim or demand at law or in equity of, in, to or against said real estate and premises and every part thereof, but the same is forever quieted in the defendants J. A. White and Annie White, his wife, the court finding the allegations contained in the answer and cross petition filed by the said defendants J. A. White and Annie White, his wife therein are true, all of which is subject however to the lien of plaintiff's said mortgage herein, being foreclosed and subject to the lien of the prior mortgage on said premises securing an indebtedness of twenty four hundred ($2,400) dollars now of record.

It is therefore ordered, adjudged and decreed by the Court that in case said defendants or any one of them neglect or refuse for six (6) months from date hereof to pay said judgment, interest, costs and attorneys' fees as herein provided and accruing costs, which costs are now taxed at $—; that an order of sale be issued by the Court Clerk to the Sheriff of Love County, Oklahoma, commanding him to advertise and sell according to law without appraisement all of the lands [fol. 148] and tenements herein described and to apply the proceeds derived therefrom as follows, towit:

First. To the payment of the costs of this action and costs of sale.

Second. In payment to this plaintiff the sum of two hundred eighty and No/100 ($280) dollars with interest thereon at the rate of ten (10%) per cent per annum from date hereof; a further sum of fifty ($50) dollars to plaintiff's attorneys herein. The rest and residue, if any, thereby to be paid to the court clerk of this court, subject to the further orders of this court.

If the amount derived from said sale be not sufficient to satisfy said judgment, interest, costs and attorneys' fees, that execution issue for the remainder unpaid against the said defendants J. A. White and Annie White, his wife.

It is further ordered, considered, adjudged and decreed by the Court that from and after the sale of said lands and tenements under and by virtue of this judgment and decree, the defendants, J. A. White and Annie White, his wife, Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and George F. Rider and all persons claiming by, through or under them or either or any of them be and they are hereby forever barred and foreclosed of and from any and all liens upon, right, title, interest or estate at law or in equity of, in, to or against said lands and premises and every part thereof, except the prior mortgage on said premises securing an indebtedness of $2,400.00.

B. C. Logsdon, District Judge.

[File endorsement omitted.]

[fol. 149] IN DISTRICT COURT OF LOVE COUNTY

[Title omitted]

MOTION FOR A NEW TRIAL—Filed April 10, 1923

Come now the defendants Millie McLish, Allie Williford, Alice Griffin, Rosie Williford and *and* Geo. F. Rider, and move the court to vacate and set aside the verdict, findings of fact, conclusions of law and judgment rendered herein, and to grant a new trial for the following causes, which materially affect the substantial rights of said defendants and each of them, towit:

First. That the verdict, findings of fact, conclusions of law and decision of the court is not sustained by sufficient evidence and is contrary to law.

Second. Error of law occur-ing at the trial, and excepted to by these defendants at the time.

Third. Error of the court in finding and concluding that the will of Frazier McLish was executed, acknowledged and approved in the manner and form required by law.

Fourth. Error of the court in finding and concluding that if said [fol. 150] will was executed, acknowledged and approved in accordance with law that Millie McLish the widow of said defendant was not entitled to dower in the lands of her deceased husband under the laws of Arkansas which were in force at the time of his death.

George F. Rider, Attorney for said Defendants.

[File endorsement omitted.]

[fol. 151] IN DISTRICT COURT OF LOVE COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR A NEW TRIAL—Filed April 10, 1923

On this the 10th day of April, 1923, came on to be heard the motion for new trial of the defendants Millie McLish, Alice Williford, Rosie Williford and Allie Griffin and Geo. F. Rider, the plaintiff being present by his attorney, T. B. Wilkins, the defendants J. A. White and Annie White, his wife by their attorney A. Eddleman and the defendants Millie McLish, Alice Williford, Rosie Williford and Allie Griffin and Geo. F. Rider by Mr. Geo. F. Rider, and all parties being ready, the Court heard said motion and the argument of counsel thereon, and being fully advised in the premises is of the opinion that said motion should be overruled.

It is therefore ordered by the Court that said motion for new trial be and the same is hereby in all things overruled and denied, to which action of the court in overruling said motion for new trial the defendants then and there duly excepted and gave notice of their intention to appeal to the Supreme Court of the State of Oklahoma, and requested the Court to grant an extension of time within which to make and serve case made herein on appeal.

[fol. 152] It is therefore ordered by the Court the defendants Millie McLish, Alice Williford, Allie Griffin, Rosie Williford and Geo. F. Rider be and they are hereby given and granted ninety days from this date within which to prepare and serve case-made herein, and that their co-defendants J. A. White and Annie White, his wife, and the plaintiff S. H. Davis be and they are allowed ten days thereafter within which to suggest amendments, and case-made may be settle thereafter by three days' notice by either party.

B. C. Logsdon, District Judge.

[File endorsement omitted.]

[fol. 153] IN DISTRICT COURT OF LOVE COUNTY

[Title omitted]

NOTICE OF APPEAL

On this the 10th day of April, 1923, the court having heard the motion for new trial of the defendants Millie McLish, Alice Williford, Allie Griffin, Rosie Williford and Geo. F. Rider, and overruled the same, to which the defendants above named excepted and gave notice of their intention to appeal to the Supreme Court of the State of Oklahoma, and requested the court to direct the Court Clerk to enter such notation on the trial and appearance docket of this Court, whereupon such request was granted, and the Court Clerk entered the following notation on the appearance docket and minutes of this Court:

"April 10, 1923.—Notice of appeal given by defendants, Millie McLish, Alice Williford, Allie Griffin, Rosie Williford and Geo. F. Rider, in open Court. W. L. Richards, Court Clerk."

[fol. 154] The above and foregoing contains and sets out fully and correctly all the pleadings and other things filed in said cause, all motions filed or made, and all rulings and orders made thereon, and all exceptions taken by the defendants to such rulings and orders; all the evidence and testimony offered or introduced in said cause and stipulations concerning the same and all exceptions taken by the defendants to the admission or exclusion of such evidence by the court upon the trial; all instructions or declarations of law given by the Court or asked by the defendants and refused by the Court, and all exceptions of defendants thereto; the judgment of the court and the exceptions of defendants thereto; and the same is a true and correct statement and a complete case-made or transcript of all the pleadings, motions, evidence, findings and judgment and all proceedings had in said cause.

[fol. 155] IN DISTRICT COURT OF LOVE COUNTY

[Title omitted]

ACKNOWLEDGMENT OF SERVICE OF CASE-MADE

The above and foregoing case-made, or transcript is hereby tendered to and served upon you and each of you as a true and correct case-made and transcript in the above entitled cause, and as a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgment and all proceedings had in the above entitled cause.

Geo. E. Rider, Attorney for Millie McLish, Alice Williford, Allie Griffin, Rosie Williford, and Geo. E. Rider.

Acknowledgement of Service

We hereby acknowledge and accept due, legal and timely service of the above and foregoing case-made and transcript this the 25 day of June, 1923.

Wilkins & Wilkins, Attorneys for Plaintiff. A. Eddleman, Attorney for J. A. White and Annie White.

[fol. 156] In District Court of Love County

[Title omitted]

Waiver of Amendments, etc.

Comes now the plaintiff, by his attorneys, Wilkins & Wilkins, and the defendants J. A. White and Annie White, by their attorney A. Eddleman, and waive the suggestion of amendments to the case-made or transcript served on us in said action and waives notice of the signing, certifying and settling of said case-made, or transcript, and agree that the same may be certified, signed and settled as a true and correct case-made in said cause at any time without notice to us.

Wilkins & Wilkins, by T. B. Wilkins, Attorney for Plaintiff
J. A. White, Annie White.

[fol. 157] In District Court of Love County

[Title omitted]

Judge's Certificate to Case Made—Filed October 6, 1923

I, the undersigned Judge of the Eighth District Court Judicial District of Oklahoma, hereby certify that the foregoing was presented to me as case-made and transcript in the action above entitled, and the plaintiff S. H. Davis, and the defendants J. A. White and Annie White having filed herein in writing their waiver of suggestion of amendments, and the defendants Millie McLish, Rosie Williford, Alice Williford, Allie Griffin and Geo. F. Rider, appearing by their attorney the said Geo. F. Rider and consenting that same be settled and signed as a true and correct case-made and transcript in said cause; I now hereby settle and sign the same as a true and correct case-made and transcript and direct that it be attested and filed by the Clerk of said Court.

Witness my hand at Okla. City in Oklahoma County, Oklahoma, this 6th day of October, 1923.

B. C. Logsdon, Trial Judge.

Attest: W. L. Richards, Court Clerk, Love County, Oklahoma. (Seal District Court Love County, Okla.)

[File endorsement omitted.]

[fol. 158] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

SUBMISSION OF CAUSE—December 31, 1923

And now on this Dec. 31st, 1923, the above cause is submitted on the record and briefs filed therein.

[fol. 159] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

JUDGMENT—October 7, 1924

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed and the cause remanded.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed and the cause remanded with directions to proceed consistent with the opinion filed therein.

Opinion by Thompson, C.

[fol. 160] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

OPINION—Filed October 7, 1924

Syllabus

1. The approval and acknowledgment of the will of a full-blood Indian required by the Act of Congress is a requisite to the validity of the devise of restricted lands, and is not an element of due execution and attestation of the will of such Indian.

2. An acknowledgment of an instrument includes the formal execution of a certificate by the officer taking the acknowledgment. Although the statute requiring the instrument to be [fol. 161] acknowledged contains no specific provision respecting certification by the officer, yet it will be taken to contemplate this formality, inasmuch as definite and certain evidence of the fact is imperatively demanded. Hence, parol evidence, not to establish omissions or defects in an existing certificate, but to prove the fact of acknowledgment unaided by any certificate, is inadmissible, and where the certificate is absent the instrument must be treated as not having been acknowledged.

3. The lack of any acknowledgment is not cured by statute, curing defective acknowledgments. Then, for a stronger reason, as in the instant case, where there is no acknowledgment of any kind or character, the failure of the acknowledgment cannot be cured by oral testimony.

[fol. 162] Error from the District Court of Love County

B. C. Logsdon, Judge

Action by S. H. Davis, as plaintiff, against J. A. White and Annie White, Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and Geo. E. Rider, as defendants, for judgment on promissory notes and for foreclosure of mortgage on real estate. Judgment for plaintiff and for J. A. White on cross-petition. Defendants, Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and Geo. E. Rider, bring error.

Reversed.

Geo. E. Rider, Madill, Oklahoma, attorney for plaintiffs in error.

Wilkins & Wilkins, McQueen & Kidd, attorneys for defendants in error.

[fol. 163] Opinion by Thompson, C.

This action was commenced by S. H. Davis, one of the Defendants in error, as plaintiff below, against J. A. White and Annie White, two of the defendants in error, as defendants below, and against Alice Williford, Allie Griffin, Rosie Williford, Millie McLish and Geo. E. Rider, plaintiffs in error, as plaintiffs below, on two promissory notes of $120 each, executed by J. A. White and Annie White, and for foreclosure of a mortgage on ninety acres of land, given by J. A. White and Annie White, as security for said notes, and for interest, attorney fees and costs.

The petition is the ordinary form of petition for an action upon promissory notes and for foreclosure of a mortgage on real estate.

The defendants in error, J. A. White and Annie White, made no contest, but in the petition, alleging that the plaintiffs in error had a claim to some right, title and interest in the real estate, they were

called upon to defend and for their answer they interposed, first, a general denial and for further answer and defense they alleged that the lands described, upon which the mortgage was sought to be foreclosed, had been selected by Frazier McLish, a full-blood Chickasaw Indian, duly enrolled as such, as a portion of his pro rata share of the lands of the Choctaw and Chickasaw Tribes of Indians in Indian [fol. 164] Territory; that said Frazier McLish died intestate and that Millie McLish was the surviving wife of Frazier McLish and, under the Laws of the State of Arkansas, which were in force in Indian Territory, was entitled to a one-third dower interest in said lands for her natural life; that Alice Williford, Allie Griffin and Rosie Williford were the children of Frazier McLish and inherited said lands, subject to the dower interest of their mother; that they were the sole and only heirs of the said Frazier McLish and that they were the owners of the real estate described in the petition and that each of them were full-blood Chickasaw Indians, duly enrolled as such; that the defendants in error, J. A. White and Annie White, had been in unlawful possession of said lands since November 15, 1907, and while in such unlawful possession they collected and used the rents and profits therefrom and that the defendants in error, J. A. White and Annie White, had no right, title or interest in said lands at the time they executed the mortgage, sued on in this action, to the defendant in error, S. H. Davis, and were wholly without authority to execute such a mortgage on said lands to secure said notes; that plaintiff in error, Geo. E. Rider, had an interest in the lands by virtue of a contract entered into between him and the other plaintiffs in error; that the plaintiffs in error had instituted an action against the defendants in error, J. A. White and Annie White, for [fol. 165] possession of the lands and the rents and profits arising therefrom, which action was still pending on appeal in the Supreme Court of this State, and prayed judgment that the defendant in error, S. H. Davis, take nothing as against them and that they have judgment against the defendants in error, J. A. White and Annie White, for the possession of the lands and $10,000 as reasonable rents and profits therefrom and that title be decreed in them as valid and perfect and title be quieted in them; that the mortgage be cancelled, set aside and held for naught and removed as a cloud upon the title of plaintiffs in error to said lands.

Defendant in error, S. H. Davis, replied by way of general denial and admitted that the lands were allotted to Frazier McLish and denied that Frazier McLish died intestate and alleged that Frazier McLish died on or about the 10th day of February, 1907, leaving a will, which was executed in accordance with the Laws of the United States of America and the Laws of Arkansas, which were in force in the Indian Territory; that said will, which was executed on the 9th day of July, 1906, and approved by and acknowledged before the Honorable Thomas N. Robnett, United States Commissioner for the Southern District of Indian Territory, First Commissioner's District, in accordance with the Act of Congress of April 26, 1906, had been admitted to probate on the 10th day of March, 1907; that the lands described in the petition were devised to one Julia Kemp, sister

[fol. 166] of the said Frazier McLish, who became the owner of and in possession of said lands and from whom title was derived. Then, by way of further reply, he set up the statute of limitation in bar of the right of plaintiffs in error to recover in this action. To said reply was attached a copy of the will of said Frazier McLish, making Julia Kemp the sole devisee of the lands, which, for the purpose of this opinion, need not be copied in the opinion further than to show the action of the United States Commissioner, which is as follows:

"Approved, July 9, 1906. Thomas N. Robnett, U. S. Commissioner for the Southern District, in accordance with the Act of Congress of April 26, 1906."

A copy of the probate proceedings, admitting said will to probate, was also attached.

The plaintiffs in error, J. A. White and Annie White, also filed a reply, which, in substance, is the same as that of S. H. Davis.

The cause was tried to the court, without the intervention of a jury, and at the close of all the evidence in the case the defendant in error, S. H. Davis, moved for judgment on the notes sued on and the foreclosure of his lien on the property, described in the mortgage, and the court rendered judgment upon the whole case that the defendant in error, S. H. Davis, recover the amount due on the [fol. 167] notes and ordered foreclosure of the mortgage, as prayed for, and that the defendant in error, J. A. White, further recover judgment against the plaintiffs in error as cross-petitioners, quieting title to the lands in controversy in the said defendant in error, J. A. White, and that plaintiffs in error take nothing by reason of their cross-petition.

Motion for new trial was filed by plaintiffs in error, heard and overruled; exceptions reserved and from the judgment of the court the plaintiffs in error appeal to this court for review.

There are two questions raised by attorney for plaintiffs in error, which are as follows:

First. "Said will is void, as to the restricted lands of Frazier McLish, deceased, he being a full blood Chickasaw Indian, and said will not having been acknowledged by him as required by the Act of Congress of April 26, 1906, (Sec. 23, 34 Stat. 137), an acknowledgment being a requisite to the validity of said instrument.

Second. "Millie McLish, the widow of Frazier McLish, deceased, is in any event entitled to her dower in the lands of her deceased [fol. 168] husband, under the laws of Arkansas in force in the Indian Territory at the time of his death."

Since the trial of the instant case and while this appeal has been pending, this court, in the case of McLish et al. v. White, 97 Okla. 150, 223 Pac. 348, has disposed of the question of limitation and also as to the question as to the conveyance, by a full-blood heir, of inherited lands adversely to the contention of the defendants in error and in our opinion this leaves but the one question to be deter-

mined here on this appeal and that is whether the will of Frazier McLish, not having been acknowledged before and approved by the officer mentioned in the Act, as required under the Act of Congress of April 26, 1906, Sec. 23, 34 Stat. 137, is void to transfer title to restricted real estate and if the same is ineffective to transfer the title to the devisee in this case, as contended by attorneys for plaintiffs in error, it naturally follows that plaintiffs in error, as the disinherited surviving wife and children of Frazier McLish, are entitled to recover in this case and the descent will be cast under the laws of inheritance, existing on February 10, 1907, the date of the death of Frazier McLish.

The statute, by which the validity of this will is to be determined, is found in the Act of Congress of April 26, 1906, Section 23, 34 Stat. 137, which is as follows:

"Every person of lawful age and sound mind may by last will [fol. 169] and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner."

It is admitted that Frazier McLish, the maker of the will, was a full-blood Chickasaw Indian, duly enrolled upon the approved rolls of said Nation, or Tribe; that the lands involved here were a portion of his allotment and come under the head of "Restricted Indian Lands." The Act, above quoted, was a special act made for a special purpose and made specially applicable to the instant case and should receive, in our opinion, a strict construction. A full-blood restricted Indian, prior to the passage of this Act, could not, in any manner, convey any portion of his allotment and the right to devise the same was withheld from him until the passage of this special Act and then the right to transfer title from himself by will after his death was further restricted by the proviso in said statute. The will clearly shows that Millie McLish was the surviving wife [fol. 170] of Frazier McLish, deceased; that Alice and Rosie Williford and Allie Griffin were his children and that by the terms of the will, whereby he conveys the real estate in its entirety to Julia Kemp, his sister, thereby, in effect, disinheriting said wife and children, who are named in the will as bearing such relation to him, although he bequeathed them the sum of one dollar, each, brings this will squarely within the proviso of the above quoted Act.

This court, in the case of In re Byford's Will, 65 Okla. 159, 165 Pac. 194, has decided that although the legal heirs may be named in the will, if the devisor attempts to deprive such heirs of their rights of inheritance by the terms of the will, that such act is, in effect, a disinheritance of such heirs and we, on the weight of authority upon this proposition, are of the opinion that the will

in the instant case disinherited the surviving wife and children of the testator.

As heretofore quoted in this opinion, there is nothing in the will, attached to the replies of the defendants in error, that shows that the will was ever acknowledged before the United States Commissioner, nor is there any certificate of acknowledgment upon said will. The only annotation preceding the signature of Thomas N. Robnett, United States Commissioner, is: "Approved July 9, 1906."

The Act of Congress, heretofore quoted, in the proviso, says that no will of a full-blood Indian, made under the circumstances set forth in the Act and under the circumstances of this case, shall be [fol. 171] valid, "unless acknowledged before and approved by a Judge of the United States Court for the Indian Territory or a United States Commissioner." It is our opinion that this language is plain and needs no construction at our hands, that Congress said what it meant and meant what it said, that there must be some form of acknowledgment shown upon the will, itself, and that this failure to show some form of acknowledgment cannot be supplied by oral testimony, or by any other means not appearing on the will, itself, and this acknowledgment must be placed upon the will at the time that the testator appears before the officer named in the Act of Congress, when he attaches his signature thereto. The will in question was not a valid will until this provision of the statute had been fully complied with, was not a valid will at the time it was executed by Frazier McLish, was not a valid will at the time of his death and, even if the contention of the defendants in error were correct, it could not have been and was not a valid will until Thomas N. Robnett, appeared before the County Court and gave oral testimony as to what transpired at the time. This, in our opinion, was not effective to give validity to the will. The several Legislatures of the different States have passed curative statutes, curing defects in acknowledgments, but these curative statutes cannot go to the extent of supplying acknowledgments that do not exist. In the case of United States v. Hiawasse Lbr. Co., 202 Fed. 35, 120 C. C. A., 289, it was held:

[fol. 172] "The lack of any acknowledgment is not cured by statute, curing defective acknowledgments."

Then, for a stronger reason, as in the instant case, where there is no acknowledgment of any kind or character, the failure of the acknowledgment cannot be cured by oral testimony, nor can the lack of acknowledgment be supplied in parol.

This court, in the case of Armstrong et al. v. Letty et al., 85 Okla. 205, has held that:

"The approval and acknowledgment of the will of a full-blood Indian required by the Act of Congress is a requisite to the validity of the devise of restricted lands, and is not an element of due execution and attestation of the will of such Indian."

The provision of the statute requires that the will must be "acknowledged before and approved by" one of the officers named in the act. The above quoted opinion holds that both the acknowledgment and approval are prime requisites to the will and where it appears, as in the instant case, that there is no record upon the will of an acknowledgment of any kind or character, the validity of the will, in our opinion, must be denied.

It is contended by attorneys for defendants in error that there [fol. 173] is no form of acknowledgment prescribed in the Act, itself, and that no certificate of acknowledgment is required. In our view of the case, this being, as defined by all the authorities, a conveyance of real estate to take effect after the death of the testator, that where the statute plainly requires that the same shall be acknowledged there must be some form of acknowledgment upon the will, itself. 1 R. C. L. 278, paragraph 55, under the head of Acknowledgments, defines acknowledgments as follows:

"An acknowledgment of an instrument includes the formal execution of a certificate by the officer taking the acknowledgment. Although the statute requiring the instrument to be acknowledged contains no specific provision respecting certification by the officer, yet it will be taken to contemplate this formality, inasmuch as definite and certain evidence of the fact is imperatively demanded. Hence parol evidence, not to establish omissions or defects in an existing certificate, but to prove the fact of acknowledgment unaided by any certificate, is inadmissible, and where the certificate is absent the instrument must be treated as not having been acknowledged."

[fol. 174] Citing in support thereof: Thompson v. Scheid, 39 Minn. 102, 38 N. W. 801; Forrester v. Reliable Transfer Co., 59 Wash. 86, 109 Pac. 312; Harrisonburg First Nat. Bank v. Paul, 75 Va. 594, 40 Am. Rep. 740.

At Sec. 59, 1 R. C. L. 60, we find, among other things, it says:

"Parol evidence is not admissible to supply omissions or cure defects nor as a rule can material statements be supplied by inference or presumption."

To the same effect is 1 C. J. 884, paragraph 263, where it is said:

"It is the general rule that the official certificate is the only competent evidence of the fact of acknowledgment; and where such certificate is defective in a matter of substance, evidence aliunde is not admissible to show that the statute was in fact complied with, and that the officer, through mistake, failed to certify the acknowledgment correctly. Accordingly parol evidence is not admissible to supply a material fact which is not shown by the certificate."

[fol. 175] Citing a long list of cases from many of the States of this Union.

We are, therefore, of the opinion, based upon the authorities above

referred to, that parol testimony was not admissible to supply the failure of any form of acknowledgment in the instant case.

This court, in the case of Proctor v. Harrison et al., 34 Okla. 181, 125 Pac. 479, in passing upon the sufficiency of an acknowledgment to the will, under consideration in that case, approved the certificate of the United States Commissioner, attached to the will, which was in the following form:

"STATE OF OKLAHOMA,
County of Hughes, ss:

"Be it remembered, that before me, L. S. Fawcett, a United States Commissioner in and for the Eastern District of the State of Oklahoma, duly appointed and acting as such, on this 21st day of July, 1908, personally appeared Taylor Foley, to me known to be the identical person who executed the foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth, and he stated [fol.176] and declared to me that said instrument was his last will and testament, and that the same was read over to him, and that he fully understood its contents prior to the execution thereof, and said will is now by me approved.

In witness whereof, I have hereunto set my hand and official seal the day and year above written.

L. S. Fawcett, United States Commissioner for the Eastern District of the State of Oklahoma."

And the court, in giving its approval to said certificate, said:

"It is not necessary to say anything further concerning this position, as it is so manifest that the acknowledgment comes within the purpose of the statute that argument cannot make it clearer."

While the above quoted opinion does not say that that is the only acknowledgment that might meet with the approval of the court, yet it does say that there must be some form of acknowledgment to meet with the requirement of the act and there being no acknowledgment, in any form, to the will under consideration here, we must say, as this court said in the case of Armstrong et al. v. Letty et al., supra, that there must be some form of acknowledgment as a prime requisite [fol. 177] to the validity of the devise of restricted lands and that must be upon the face of the will, itself, that the failure of the United States Commissioner to show the due acknowledgment of the will by the testator is fatal to the will and that no rights can accrue to the devisee or to those claiming under her.

We are, therefore, of the opinion that the judgment of the lower court should be and is hereby reversed and the cause remanded for further proceedings in the trial court not inconsistent with this opinion.

[fol. 178] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING—Filed November 15, 1924

Come now the defendants in error and represent and show that under date of October 7th, 1924, an opinion and judgment was rendered in this cause reversing the judgment of the trial court, all as is more fully shown by the original opinion on file with the Clerk of this Court.

The defendants in error show that the opinion and judgment of the court is adverse to the claims and demands of these defendants in error and further show the court that a rehearing should be granted herein for the following grounds and reasons:

That this Court in its opinion in construing Section 23 of the Act of Congress of April 26th, 1906, has overlooked the proper construction to be placed on said Act of Congress herein. By said Act of Congress it is required that the will of a full blood Indian disinheriting the parent, wife, spouse or children, in order to be valid, must be acknowledged before a judge of the United States Court for the Indian Territory or a United States Commissioner; that the proper construction to be placed upon said Act was duly presented by Counsel for the defendants in error in their brief, but such construction has been wholly overlooked by the court in this, that this court [fol. 179] holds that Congress contemplated that the United States Court for the Indian Territory or a United States Commissioner must, in order to give such will validity, place thereon a certificate of acknowledgment, when in truth and in fact, what was contemplated by Congress was that the testator acknowledge the will in the manner and form as had obtained in the several states of the United States at and prior to the time of the Congressional enactment referred to; that the court further overlooked a question decisive of the case and duly submitted by counsel namely, that the proper method of proving the acknowledgment contemplated by the Act of Congress was to produce at the trial as a witness, the officer before whom such acknowledgment was made and that a certificate of acknowledgment was not sufficient evidence to prove the acknowledgment required as is held by this court in this opinion.

Wherefore, the defendants in error pray that a rehearing be granted in this cause, that the opinion heretofore rendered be withdrawn and that an opinion and judgment be rendered affirming the judgment of the trial court. A brief in support of this petition for rehearing is filed herewith.

McQueen & Kidd, Attorneys for Defendants in Error, 1009 Colcord Bldg., Oklahoma City, Okla.

[fol. 180] [File endorsement omitted]

[fol. 180-1] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

BRIEF IN SUPPORT OF PETITION FOR REHEARING—Filed November 15, 1924

This case presents a question which is entirely new to this Court, and after a thorough search of the reported cases rendered by the courts of this country and of England we find no case which can be said to be directly authoritative. We had thought that we had presented in our previous briefs our views on the question upon which this Court decides this case, but upon reading the opinion it would appear that the Court has either dismissed our view as unworthy of consideration, or has failed to grasp the idea we intended to con-
[fol. 180-2] vey. Be that as it may, we shall still insist that the principles of law we have presented in our previous briefs are well founded in the decided cases both in England and in this country, and with all respect due this Court, we are of the view that the opinion rendered does not take into consideration the applicable principles of law which in our judgment are determinative of the real question involved. If we appear to be insistent and if we repeat to some extent the matters presented in our original briefs it is because of our firm conviction that this Court is wrong in its opinion rendered in this case, and in addition to our own interests in the cause of our client, there is also the faith within us that the Court should and intends to base its opinion on proper legal foundations.

We will consider but one question in this brief, inasmuch as the opinion of the Court is based on but one question. What did Congress mean when it provided in Section 23 in the Act of Congress of April 26, 1906, 34 Stat. 137:

"That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits a parent, wife, spouse
[fol. 180-3] or child of such full-blood Indian, unless acknowledged before, and approved by a judge of the United States court for the Indian Territory or a United States commissioner."

In other words, what does the word "Acknowledged" mean as used in this section of the Act of Congress?

The record shows that the Indian testator did in fact acknowledge the instrument which he intended to be his last will and testament before a United States commissioner. The testimony of this United States commissioner at the trial of this cause is very clear and definite that the testator did in fact acknowledge the will to be his own will; that is, the testator appeared before the proper officer designated in the Act of Congress and stated that the instrument was his will, and thereupon this officer approved the will and endorsed thereon the evidence of his approval.

This Court says, however, that what Congress contemplated was that a certificate of acknowledgment be placed on the will itself by

the officer as evidence of said acknowledgment. In so holding this [fol. 180-4] Court has wholly failed to distinguish between a deed of conveyance and a last will and testament, and the opinion nowhere evidences that the two classes of documents are very clearly and definitely distinguishable. In fact, this Court in the opinion says:

"In our view of the case, this being as defined by all the authorities a conveyance of real estate to take effect after the death of the testator, that where the statute plainly recognizes that the same shall be acknowledged there must be some form of acknowledgment upon the will itself."

If this is the law, or ever has been the law as the Court says "all the authorities hold," then concededly we have no case. But a will is not a conveyance and never has been so considered in the legal use and definition of the term "conveyance." If a will is a conveyance the devisee named in the will has a present vested interest in the estate devised which cannot be recalled by the testator. One essential of a will is that it is posthumous in its operation. A will is valid without delivery; a deed is not. A deed is valid without witnesses, a will is not. A will is a disposition intended to become operative only upon the death of the maker and it is the death which transfers [fol. 180-5] the property and not the will itself, while it is a deed of conveyance which transfers the property to take effect upon delivery.

The Court says that "all the authorities so hold" to the effect that a will is a conveyance, but in such a statement the Court may speak "ex cathedra," but we are still in a position to question this Court's "infallibility." In view of the position taken by the Court, we find it necessary to refer to a few authorities which distinguish between a will and a deed of conveyance, and it must be borne in mind that Congress was legislating in respect to wills and not to deeds of conveyance, when it provided that the will must be acknowledged before a designated officer. We quote from Bell v. Couth, 43 S. E. 911, 132 N. C. 346:

"While in a certain sense, a will is a conveyance of real estate in common, we may say, in legal language, it is not so understood or referred to. The one who takes comes to his estate by purchase, and not by descent, but he is a 'devisee' and not a grantee. We do not think, looking to the purpose of the Legislature, and the meaning of the language used, that the statute can be construed to include wills under the general term 'conveyance.'"

[fol. 180-6] See also 57 S. E. 652, 107 Va. 79.

We quote also from the Supreme Court of Kansas in the case of Comstock v. Adams, 23 Kan. 513, 33 Am. Rep. 191:

"The word 'conveyance' as used in the proviso of said Section 8 does not include a will. A will is never a conveyance. A conveyance operates in the lifetime of the grantor, while a will does not operate until after the death of the maker. Of course, death transfers all property, and a will says where it shall go; but this does not render

a will 'a conveyance,' which the husband has made. It is the death that transfers the property."

We quote also from the Supreme Court of Kentucky in the case of May's Heirs v. Slaughter, 10 Ky. 505:

"We therefore conceive that the word 'convey' used in this Act, intended the passing of title by conveyance, technically so called, and not wills, which are only quasi conveyances."

We say, therefore, that a will is not a conveyance in the well defined use of the term as it existed at the time the Act of Congress under consideration went into effect.

Congress therefore meant what it said and said what it meant when [fol. 180-7] it provided that a will must be acknowledged. Congress was not legislating in respect to deeds of conveyance, etc., but was legislating in respect to last wills and testaments. All laws, therefore, in force at the time relating to the same subject must therefore be construed together and given effect as a whole in order to accomplish the purpose for which such legislation was passed.

Quinton Relief Oil & Gas Co. v. Corporation Commission, 224 Pac. 156.

This particular Act of Congress did not purport to legislate in respect to the manner of the execution of wills except to provide that the will must be acknowledged before and approved by a United States commissioner. The Act does not say the will must be in writing. It does not say that the will must be subscribed by the testator or if subscribed, it does not say that it must be subscribed at the end of the will. It does not provide for attesting witnesses other than the United States commissioner.

Neither does it provide that the testator at the time must acknowledge the will and declare the instrument to be his will. Congress contemplated [fol. 180-8] that this act should be construed together with the laws in force in the Indian Territory respecting wills. Under the provision of Mansfield's Digest set forth in Section 6492, there are four requirements to the valid execution of a will:

"(1) It must be subscribed by the testator in the end of the will," et cetera.

"(2) Such subscription shall be made by the testator in the presence of each of the attesting witnesses, *or shall be acknowledged by him to have been so made to each of the attesting witnesses* (italics ours).

"(3) The testator at the time of making such subscription, *or at the time of acknowledging the same*, shall declare the instrument so subscribed to be his will and testament (italics are ours).

"(4) There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator."

The provisions in Mansfield's Digest above set forth must be construed in connection with the Act of Congress requiring that the will be acknowledged before and approved by a United States commissioner.

At the time of this legislative enactment there was also in force in [fol. 180-9] the Indian Territory certain laws relating to acknowledgments of deeds of conveyance, etc., and this Court has confused the distinction between an acknowledgment to a will and a certificate of acknowledgment to a deed of conveyance. Section 654 of Mansfield's Digest provided that the court or officer that shall take proof of an acknowledgment of any deed, etc.:

"Shall grant a certificate thereof and cause such certificate to be endorsed on said deed, etc."

It will be noted that under the provisions as set forth in Mansfield's Digest there was a marked distinction between the acknowledgment of the deed which was the act of the grantor and the certificate of the officer that such acknowledgment had been made, and it will be noted that Congress did require that the will of a full-blood Indian should be acknowledged, but did not require that the officer before whom the acknowledgment was made "shall grant a certificate thereof and cause such certificate to be endorsed." Sec. 646 of Mansfield's Digest provides substantially that the Act relating to the conveyance of real estate shall not be construed so as to embrace last wills and testaments. Section 664 of Mansfield's Digest provides that after the deed [fol. 180-10] is acknowledged and certified it shall be entitled to record and read in evidence without further proof. All of the provisions relating to wills and deeds of conveyance as set forth in Mansfield's Digest must be construed together with the Act of Congress under consideration, and it must necessarily follow that effect must be given to the distinction existing at the time between an acknowledgment and a certificate of acknowledgment, and further to the express provision that the Act relating to deeds of conveyance should not be construed so as to embrace last wills and testaments.

It is also a well settled rule of construction that "where a statute is taken from another state which had been previously construed by the highest court of that State, the statute is deemed to have been adopted with the construction so given." St. Louis & S. F. R. Co. v. Bruner, 52 Okla. 349, 152 Pac. 1103; Braden v. Gulf Coast Lumber Co., 215 Pac. 202, and cases therein cited. The provision of the Act of Congress requiring that a will be acknowledged had been construed by the courts of England and of this country since the first statute of [fol. 180-11] wills was enacted by the English Parliament in 1677, but this Court, notwithtsanding its attention was called to the well defined meaning of the term "acknowledged" in respect to wills, and notwithstanding centuries of judicial decisions and legislative enactments which judicial decisions and legislative enactments became a part of the Act of Congress wherein it was provided that the will of a full-blood Indian must be acknowledged, has apparently failed to see any distinction between a will and a deed of conveyance.

It would seem unnecessary, but we would feel remiss in our duty if we did not refer this Court to the early English law relating to wills. This is rendered necessary, however, in view of the dire confusion existing in the mind of the Court and hence we find it necessary to go back to what we had considered were elementary principles.

Under the early English law no solemnity seems to have been required to make any will. The first statute of Wills, 32 Henry VIII c. 1, was intended simply to make lands devisable and provided that they might be devised in writing. This statute was held to be satisfied by an unsigned writing not containing the name of the testator, [fol. 180-12] and in the handwriting of another. This gave rise to such frauds and perjuries that the Statute of Frauds was enacted, 29 Car. II c. 3, Sec. 18 (1677). The applicable provision is Sec. 5 of the Statute of Frauds:

"And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills or by this statute or by force of the custom of Kent or the custom of any borough or any other particular custom, shall be in writing and signed by the party so devising the same or by some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses or else they shall be utterly void and of none effect."

All the statutes relating to wills enacted in England and in this country are based on this original Statute of Frauds enacted in the year 1667. Under this statute a will shall be in writing signed by the person so devising and "attested and subscribed." Of the requirement of the Statute of Frauds, 29 Car. II, touching the attestation, the first point settled was that the witnesses need not see the testator sign. Soon after the statute was passed several judges maintained [fol. 180-13] that there was not a sufficient attestation unless all the witnesses were present at the same time and saw the testator sign; but it was soon settled that inasmuch as the statute did not require the testator to sign in the presence of witnesses, it was enough if he acknowledged to them the will he had already signed. Cook v. Parsons (1701), Finch's Pres., ch. 184; Stonehouse v. Evelyn (1734); 3 P. Wms. 252; Grayson v. Atkinson (1752), 2 Ves. Sr. 454.

It will be noted that the original statute of frauds did not specifically provide that the will might be acknowledged by the testator, but as we have shown, it was soon held that the acknowledgment was sufficient as a substitute for a signing in the presence of the witnesses. Rood on Wills, Sec. 273. It will be noted that the statute in force in the Indian Territory relating to wills expressly allowed the subscription of the testator to "Be acknowledged by him to have been so made to each of the attesting witnesses" and wherever the acknowledgment is not expressly allowed the acknowledgment is held to be a sufficient compliance with the statute. Woodruff v. Hundley, 127 Ala. 640, 29 So. 98; Sterling v. Sterling, 64 N. D. 138; Hall v. Hall,

[fol. 180-14] 17 Pick. (Mass.) 373; Cravens v. Falconer, 28 Mo. 19; Welch v. Adams, 63 N. Ham. 344, 1 Atl. 1; Raudebaugh v. Shelley, 6 Ohio St. 307.

The cases we have cited and other cases which we might cite, show that the word "acknowledgment" had a well defined meaning at the time of the congressional enactment under discussion, and we say, therefore, that this well defined meaning became a part of the statute. In view, then, of the previous statutory provisions providing for acknowledgment of wills, and the judicial construction placed thereon by the courts, it seems impossible to suppose that Congress intended that the United States commissioner must place on the will itself a certificate of acknowledgment as this Court holds in the opinion rendered herein. We repeat, the section authorizing the Indian to make a will deals only with wills and has no reference to deeds of conveyance. Could it be said by any reasonable rule of construction that it was ever intended that the phrase in Mansfield's Digest, Sec. 6492, subdivision 2, "shall be acknowledged" as a permitted substitute for signing in the presence of the testator meant that the attesting witness should place on the will a certificate of acknowledgment, and yet [fol. 180-15] this Court, we think, has gone to such an absurdity. It is just as reasonable to say that all legislative provisions relating to the acknowledgment of wills require a certificate of the attesting witnesses as for this Court to say that the acknowledgment provided for in the Act of Congress required a certificate to be added to the will itself. It is customary, but never required, for the attesting witnesses to sign what is known as an attestation clause, but we know of no statute in any state which makes such clause a prerequisite to the validity of the will. This Court in its opinion quotes at some length from I. R. C. L. p. 278, Secs. 55 and 59; also 1 C. J. 884, par. 263. With the law as there announced we have no dispute but a casual reading of all of each article appearing in either work under the title "Acknowledgments" shows that the acknowledgment therein referred to concerns only deeds, mortgages, etc., which are required by law to be recorded in order to import notice. Nowhere in any of the quotations by this Court in its opinion is there any reference to last wills and testaments concerning which Congress was legislating, and again we call the attention of the Court to the specific provision as set forth in Sec. 646 of Mansfield's Digest, that the act relating [fol. 180-16] to conveyances of real estate (providing for a certificate of acknowledgment) should not be construed so as to embrace last wills and testaments. If Congress had intended to legislate on the whole subject relating to wills, to the exclusion of the laws in force in the Indian Territory, it would necessarily have had to have made many additional provisions, such as that the will shall be in writing, that it must be subscribed by the testator at the end of the will, that the subscription must be made by the testator in the presence of each of the attesting witnesses, or be acknowledged by him to have been so made to each of the attesting witnesses, and also providing for a publication of the will, and providing also that the witnesses shall sign their names at the request of the testator. The Act of Congress is only an additional requirement which in effect

says that the Indian must come before the United States commissioner and by some act indicate that the document he has executed is his will. That constitutes an acknowledgment and it was then the duty of the United States commissioner to either approve or disapprove the will.

[fol. 180-17] It is a fact not disputed that the testator did acknowledge the will, but no certificate of acknowledgment was placed on the will for the very simple reason that the instrument was a will not a deed. The law in force in the Indian Territory relating to wills required no such certificate and had a certificate been placed thereon it would have been mere surplusage. A certificate was required only on deeds of conveyance so that they could be recorded and then "read in evidence without further proof."

Further, under all statutes and rules of evidences relating to wills a much higher degree of proof was and is required to prove a will when offered for probate or as a muniment of title than was or is necessary to prove a deed of conveyance. A deed, if it had a certificate of acknowledgment was and is properly admitted in evidence, without further proof of its execution. A will, however, must be proved by the best evidence obtainable. The person before whom a will is acknowledged must be produced as a witness, if available. Under the laws in force in the Indian Territory relating to the proving of wills, as set forth in Sec. 6508, and the succeeding sections of Mansfield's Digest it was there provided that if a witness, namely, [fol. 180-18] one who had either witnessed a signature or one before whom the will had been acknowledged, should be outside the state or should be unable to attend the hearing, a commission should issue. It was further provided that when one witness had been examined and the other witnesses were dead, insane, or their residences unknown, proof could be then taken of the handwriting of the testator and the witnesses and other circumstances "as would be sufficient to prove such a will in a trial at common law." It was further provided that if all the witnesses were dead, insane or their residence unknown proof should be taken of the handwriting of the testator and the witnesses and of such facts and circumstances as would be sufficient to prove such will in a trial at common law. Now, in a trial at common law, the only method of proving the due execution and acknowledgment of a will was to produce the witnesses before whom the will was acknowledged, at least such testimony was primary evidence.

These were rules of evidence which had obtained in England and in the several states in this country, including the Indian Territory, at the time of the congressional enactment, and yet this Court pre- [fol. 180-19] sumes to say that a certificate reciting facts which previously could be proved only by the production of the witness himself is sufficient. It is difficult to see what value a certificate on the will would be as the witness (in this case a designated witness) must be produced, if available, at the trial of the case. This was a well recognized and established rule of evidence. The person before whom the will was acknowledged must be present, if available, to

testify in person and be subjected to cross-examination as to the acts of the testator in reference to the acknowledgment of the will. Congress nowhere evidences an intent to change this rule of evidence. Congress could easily have said that a certificate of acknowledgment executed by the United States commissioner would be sufficient evidence of the fact of such acknowledgment, but the rules of evidence in reference to th- proof required after the death of the testator, as to the fact of such acknowledgment had been established for centuries, and yet this Court in effect revolutionizes the whole law of evidence in respect to the character of proof required to prove the acknowledgment to a will, when it requires that a certificate be attached. If a certificate is attached of what value is it except that [fol. 180-20] it might refresh the recollection of the witness when called upon to testify in open court. It might have the same effect as an attestation clause but the presence of an attestation clause upon a will does not release the proponent of a will in the event of a contest from producing the attesting witnesses, when available. It is indeed unfortunate that the word "acknowledge" in statutes requiring that a will be acknowledged is the same word as that employed in statutes requiring that a deed be "acknowledged" before it is entitled to record and read in evidence without further proof. It is only because the words are the same that this Court has become confused and has fallen into the error of which we complain. In our previous briefs we tried to show the distinction between an acknowledgment and a certificate of acknowledgment but our attempts seem to have been futile because the Court in its opinion does not appear to have noticed that there is a marked distinction.

Our own statutes provide that the father of an illegitimate child by publically acknowledging it as his own, etc., thereby adopts it as such. Sec. 8057, Rev. Laws 1921.

[fol. 180-21] Sec. 191, Revised Laws 1921, provides for an acknowledgment of a debt, thereby tolling the statute of limitations. It is just as reasonable to hold that the acknowledgment referred to in these statutes, in order to be effective, requires that some person certify to such acknowledgment as it is to hold that Congress intended that the United States commissioner should place on the will a certificate of acknowledgment.

We note the Court in this opinion says, speaking of the requirement that the will of a full-blood Indian be acknowledged and approved, says that

"this language is plain and needs no construction at our hands, that Congress said what it meant and meant what it said."

and therefore we say it might be suggested with due propriety that it was quite unnecessary for the Court to proceed to quote at some length from legal publications in which the law is probably correctly stated, but has no bearing on the question before the Court.

It is our view that the opinion would have had some semblance of logic if the Court had stopped with the quotation we have just set forth.

[fol. 180-22] In addition to what we have said it will be noted that the United States commissioner wrote under the will:

"Approved by me in accordance with the Act of Congress of April 26, 1906."

This we say, is a certificate to all intents and purposes by which he not only approves the will but by necessary inference says that the testator acknowledged the will before him. It is true that there is no use of the word "acknowledge," which seems to be the magic word required by this Court in order to give the will any validity. The United States commissioner did recite that the document was approved in accordance with the Act of Congress. Now, if the Act of Congress was complied with as the United States commissioner says, the will must necessarily have been acknowledged by the testator.

We say further that if this opinion is allowed to stand it will open the door to fraud instead of preventing fraud as Congress undoubtedly contemplated. The only inference which can be drawn from a reading of this opinion is that a will may be introduced in [fol. 180-23] evidence without further proof if it bears a certificate of acknowledgment. That is the purpose of a certificate of acknowledgment. Congress contemplated that the fact of such acknowledgment be proved by the personal presence of the designated federal officer at the trial when the issue of such acknowledgment was raised. The testator being dead, would of course be unavailable as a witness to disprove the effect of the certificate of acknowledgment. But this Court, in effect, says that the will proves itself, if there is appended to it a certificate of acknowledgment. The question resolves itself into the character of proof required to prove that the testator acknowledged the will. The Court says that a certificate of acknowledgment is sufficient, such as is true in the case of a deed. We say that Congress did not intend to change a well established rule of evidence, viz: that the person before whom the acknowledgment was made must be produced at the trial to testify as to the facts relating to such acknowledgment and be subjected to cross-examination by the contestants of the will.

At the trial of this cause the United States commissioner did testify that the testator acknowledged the document to be his will. [fol. 180-24] Under the rules of evidence if his personal presence was obtainable he was an indispensable witness. He could have placed on the will itself every form of acknowledgment conceivable but it would have been the bounden duty of the trial court to declare the will invalid if this particular witness had not been produced or his absence accounted for, in which event secondary evidence of such acknowledgment would have been competent.

These rules of evidence are elementary but this Court has wholly failed to distinguish between an acknowledgment of a will and an acknowledgment of a deed, notwithstanding the two classes of acknowledgment have never, so far as we can find, been confused (except by this Court) by any judicial decisions. Through centuries of judicial decisions and legislative enactments there has been no

confusion as to the meaning of the requirement that a will be acknowledged or the character of proof required to prove such acknowledgment, until the opinion rendered by this Court.

The opinion stands alone without foundation in logic, contrary to precedent, and appears to have come into existence only because the [fol. 180-25] word "acknowledge" is often used in a different sense, while this Court is of the opinion that it can be used only in one sense, that is, "Congress meant what it said and said what it meant."

There is more involved in this lawsuit than appears by the record, and while we cannot say that the rule of law for which we contend has become a rule of property, yet it is undoubtedly true that many titles will fail if the law as announced in this opinion is permitted to stand.

The various states of the Union have statutes which provide the form of acknowledgments for deeds and specify the officers who may take the acknowledgment and designate what the certificate shall contain, but this is for an entirely different purpose from that of the Act of Congress under consideration. This is quite different from the requirements of the Act of Congress giving no form but simply requiring that the Indian should appear before the proper officer and acknowledge the document as his will. The requirement for the acknowledgment before the officer was placed in the Congressional Act, not that certain certificates should be endorsed thereon, but [fol. 180-26] that the Indian be required to come in person before the commissioner and acknowledge the document and request the approval of the commissioner, all of which was done in this case.

We call the attention of this Court to Sec. 11,231, Rev. Laws 1921, relative to the formal requisites of a will. Subdivision No. 2 provides that:

"The subscription must be made in the presence of the attesting witnesses, or *be acknowledged* by the testator to them, to have been made by him or by his authority" (italics are ours).

We also call the attention of the Court to Sec. 1104 and 1108 of the Rev. Laws of 1921. Sec. 1104 provides that if there is no contest

"The court may admit it (meaning it will) to probate on testimony of one of the subscribing witnesses only."

Section 1108 fixes the rule of evidence for which we are contending, namely, that in the event of a contest

"All the subscribing witnesses who are present in the county, * * * must be produced and examined * * *."

These were the rules of evidence obtaining at the time of the [fol. 180-27] trial in this cause and by these rules of evidence the trial court was properly guided.

We also call the attention of the Court to the previous briefs filed by the defendants in error.

We respectfully submit that the opinion heretofore rendered be withdrawn and an opinion rendered affirming the judgment of the trial court.

Respectfully submitted, McQueen & Kidd, Attorneys for Defendants in Error.

[fol. 181] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING

And now on this Jan. 7th, 1925, it is ordered by the court that the petition for rehearing filed in the above cause, be, and the same is hereby denied.

[fol. 182] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER STAYING MANDATE—January 10, 1925

And now on this Jan. 10th, 1925, it is ordered by the Court that the mandate in the above cause be stayed for a period of 30 days and thereafter, upon the filing of pleading in the Supreme Court of the United States, that said mandate be stayed pending determination of said cause in the Supreme Court of the United States.

N. E. McNeill, Chief Justice.

[fol. 183] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER STAYING MANDATE—February 4, 1925

On this Feb. 4th, 1925, it is ordered that the mandate in this cause be stayed pending the determination of the application to file second petition for rehearing heretofore filed in this cause.

Geo. M. Nicholson, Chief Justice.

[fol. 184] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER OVERRULING MOTION FOR LEAVE TO FILE SECOND PETITION
March 5, 1925

And now on this March 5th, 1925, it is ordered by the court that the application for leave to file second petition for rehearing, filed in the above cause, be, and the same is hereby denied.

[fol. 185] IN SUPREME COURT OF OKLAHOMA

CLERK'S CERTIFICATE

I, Wm. M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 184 pages, numbered from 1 to 184, inclusive, is a true and complete transcript of the record and all proceedings in the said Supreme Court of Oklahoma, in the case of Alice Williford, et al., vs. S. H. Davis, et al., No. 14,762, as the same remains upon the files and records of said Supreme Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Oklahoma City, Oklahoma, this the 11th day of March, 1925.

Wm. M. Franklin, Clerk Supreme Court of Oklahoma, by Reuel Haskell, Jr., Assistant. (Seal of Supreme Court, State of Oklahoma.)

Endorsed on cover: File No. 30,957. Oklahoma Supreme Court. Term No. 992. S. H. Davis, J. A. White, and Annie White, plaintiffs in error, vs. Alice Williford, Allie Griffin, Rosie Williford, et al. Filed March 16, 1925. File No. 30,957.

POSTPONED TO MERITS
JUN 1 - 1925

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925

No. [redacted] 316

S. H. DAVIS, J. A. WHITE, AND ANNIE WHITE,
PETITIONERS,

vs.

ALICE WILLIFORD, ALLIE GRIFFIN, ROSIE WILLIFORD ET AL.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

CHARLES J. KAPPLER,
I. R. McQUEEN,
C. B. KIDD,
Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 992.

S. H. DAVIS, J. A. WHITE, AND ANNIE WHITE,
PETITIONERS,

vs.

ALICE WILLIFORD, ALLIE GRIFFIN, ROSIE WILLIFORD, MILLIE McLISH, AND GEO. E. RIDER, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, S. H. Davis, J. A. White and Annie White, respectfully present to this Court this their petition for Writ of Certiorari, to be directed to the Supreme Court of the State of Oklahoma, commanding said Court, and the Clerk thereof, to certify to this Court the records and proceed-

ings of the case in said Court wherein your petitioners were defendants in error and the respondents were plaintiffs in error, together with the opinion of said Court therein for the review and determination of said cause by this Court.

Your petitioners further show that a decree and decision was made and entered by the Supreme Court of the State of Oklahoma in said cause therein pending on the 7th day of October, 1924, wherein and whereby the judgment of the District Court of Love County, State of Oklahoma, was reversed and remanded. That thereafter, and within the time allowed by the rules of the Supreme Court of the State of Oklahoma, a petition for rehearing was filed with said Supreme Court of the State of Oklahoma, and thereafter, and on the 7th day of January, 1925, an order was made and entered, without opinion, denying the said petition for rehearing filed by your petitioners.

That on the 16th day of March, 1925, a certified copy of the entire transcript of the record in said case, including all the proceedings in said Supreme Court of the State of Oklahoma, to which the Writ of Certiorari herein prayed for is to be directed, was filed in this Court with the Clerk thereof, on Writ of Error to the said Supreme Court of the State of Oklahoma, and said case was docketed by the Clerk of this Court and numbered 992 of the October term, 1924, on said docket, and your petitioners hereby file this their petition for said Writ of Certiorari and they hereby refer to the transcript of the record now pending in this Court on Writ of Error, which said transcript of the record of the Supreme Court of the State of Oklahoma is hereby referred to and made a part hereof, the same as if said transcript were fully set forth herein in this petition for Writ of Certiorari.

Your petitioners show that there was selected by one Frazier McLish in his lifetime, as an allotment to which he was entitled as a portion of his pro rata share of the lands of the Choctaw and Chickasaw Nations or Tribes of Indians in the Indian Territory (now State of Oklahoma) certain lands; that the said Frazier McLish was a full-blood Chickasaw Indian, duly enrolled as shown on the final approved Chickasaw Roll, opposite No. 3805. That subsequent to the selection and allotment hereinabove set forth the said Frazier McLish, on the 10th day of February, 1907, departed this life and at the time of his death was a resident of the Southern District of the Indian Territory. That the said Frazier McLish, during his lifetime and on the 9th day of July, 1906, executed a will wherein he devised and bequeathed all his property to his sister, Julia Kemp, including the lands allotted to him as a member of the Chicksaw Nation.

Your petitioners further show that at the time of the death of the said Frazier McLish he left surviving him his wife, Millie McLish, and his daughters, Alice Williford, Allie Griffin and Rosie Williford, and that by the terms and provisions of said will he bequeathed to his wife, Millie McLish, the sum of one ($1.00) dollar, and to each of his daughters the sum of one ($1.00) dollar.

That prior to the date of the execution of said will the Congress of the United States passed an act known as the Act of April 26, 1906 (34 Stat. L. 137), which said act was approved on April 26, 1906, wherein it is provided, in Section 23 of said act, as follows:

> "Every person of lawful age and sound mind may, by last will and testament, devise and bequeath all of his estate, real and personal, and all interest

ings of the case in said Court wherein your petitioners were defendants in error and the respondents were plaintiffs in error, together with the opinion of said Court therein for the review and determination of said cause by this Court.

Your petitioners further show that a decree and decision was made and entered by the Supreme Court of the State of Oklahoma in said cause therein pending on the 7th day of October, 1924, wherein and whereby the judgment of the District Court of Love County, State of Oklahoma, was reversed and remanded. That thereafter, and within the time allowed by the rules of the Supreme Court of the State of Oklahoma, a petition for rehearing was filed with said Supreme Court of the State of Oklahoma, and thereafter, and on the 7th day of January, 1925, an order was made and entered, without opinion, denying the said petition for rehearing filed by your petitioners.

That on the 16th day of March, 1925, a certified copy of the entire transcript of the record in said case, including all the proceedings in said Supreme Court of the State of Oklahoma, to which the Writ of Certiorari herein prayed for is to be directed, was filed in this Court with the Clerk thereof, on Writ of Error to the said Supreme Court of the State of Oklahoma, and said case was docketed by the Clerk of this Court and numbered 992 of the October term, 1924, on said docket, and your petitioners hereby file this their petition for said Writ of Certiorari and they hereby refer to the transcript of the record now pending in this Court on Writ of Error, which said transcript of the record of the Supreme Court of the State of Oklahoma is hereby referred to and made a part hereof, the same as if said transcript were fully set forth herein in this petition for Writ of Certiorari.

Your petitioners show that there was selected by one Frazier McLish in his lifetime, as an allotment to which he was entitled as a portion of his pro rata share of the lands of the Choctaw and Chickasaw Nations or Tribes of Indians in the Indian Territory (now State of Oklahoma) certain lands; that the said Frazier McLish was a full-blood Chickasaw Indian, duly enrolled as shown on the final approved Chickasaw Roll, opposite No. 3805. That subsequent to the selection and allotment hereinabove set forth the said Frazier McLish, on the 10th day of February, 1907, departed this life and at the time of his death was a resident of the Southern District of the Indian Territory. That the said Frazier McLish, during his lifetime and on the 9th day of July, 1906, executed a will wherein he devised and bequeathed all his property to his sister, Julia Kemp, including the lands allotted to him as a member of the Chicksaw Nation.

Your petitioners further show that at the time of the death of the said Frazier McLish he left surviving him his wife, Millie McLish, and his daughters, Alice Williford, Allie Griffin and Rosie Williford, and that by the terms and provisions of said will he bequeathed to his wife, Millie McLish, the sum of one ($1.00) dollar, and to each of his daughters the sum of one ($1.00) dollar.

That prior to the date of the execution of said will the Congress of the United States passed an act known as the Act of April 26, 1906 (34 Stat. L. 137), which said act was approved on April 26, 1906, wherein it is provided, in Section 23 of said act, as follows:

> "Every person of lawful age and sound mind may, by last will and testament, devise and bequeath all of his estate, real and personal, and all interest

therein: Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner."

Your petitioners show that following the signature of said Frazier McLish, there appears on said will the following:

"We, James A. Cotner, George Cotner, and W. Wade, have hereunto subscribed our names as witnesses to the above and foregoing last will and testament of Frazier McLish at the request of the said Frazier McLish, and in his presence and in the presence of each other on this 9th day of July, 1906.

JAMES A. COTNER.
GEORGE COTNER.
W. WADE.

"Approved July 9, 1906.

[SEAL.] THOMAS N. ROBNETT,
U. S. Commissioner for the Southern District, Indian Territory, First Commissioner's District, in Accordance with the Act of Congress of April 26, 1906.

Your petitioners further show that under the proviso of said Section 23 of the Act of Congress of April 26, 1906 (34 Stat. L. 137),

"No will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such

full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner."

That subsequent to the death of the said Frazier McLish and on the 20th day of March, 1907, said will was duly admitted to probate by order of the United States Court for the Southern District of the Indian Territory and that thereafter the said Julia Kemp, being the devisee under the will of said Frazier McLish, deceased, by a good and sufficient warranty deed, conveyed the premises to your petitioner, J. A. White. That on November 15, 1907, the said petitioners, J. A. White and Annie White, went into possession of said premises and have been in the continuous, open and notorious possession of said premises ever since said date. That thereafter and on the 24th day of January, 1920, J. A. White and Annie White executed and delivered to S. H. Davis their certain promissory notes, which said notes were secured by a mortgage on ninety (90) acres of land which had been allotted to Frazier McLish, deceased, the said J. A. White, Annie White and S. H. Davis claiming title through Julia Kemp, the devisee under the will of the said Frazier McLish, deceased.

That this action was originally commenced to foreclose a second mortgage executed by said J. A. White and Annie White to the said S. H. Davis on said land and judgment was rendered in favor of the plaintiff in said action, to-wit: S. H. Davis, from which judgment an appeal was taken by the respondents herein to the Supreme Court of the State of Oklahoma, and an opinion and judgment was rendered by the Supreme Court of the State of Oklahoma reversing the

judgment of the District Court, said District Court having decreed that the respondents herein had no right, title or interest in and to the property sought to be foreclosed.

That on the trial of said cause in the District Court of Love County, Oklahoma, there was present as a witness on behalf of your petitioners, the Honorable Thomas N. Robnett, the said Thomas N. Robnett being the same Thomas N. Robnett by whom the will of Frazier McLish was approved, and the said Thomas N. Robnett in the trial of this cause testified that the said Frazier McLish did in fact appear before him, he then being a United States Commissioner for the Southern District of the Indian Territory, at the time the will of the said Frazier McLish bears date, and the said Thomas N. Robnett did further testify that the said Frazier McLish did in fact acknowledge the document to be his last will and testament; that findings of fact were made by the trial court in accordance with the testimony of the said Thomas N. Robnett, which findings of fact were not disturbed by the opinion and judgment of the Supreme Court of the State of Oklahoma.

Your petitioners further show that at the time the Act of Congress of April 26, 1906 (34 Stat. L. 137), became effective there was in force in the Indian Territory certain laws of Arkansas contained and set forth in Mansfield's Digest, and more particularly as substantially set forth in Section 6494, providing four requirements to the valid execution of a will:

> (1) It must be subscribed by the testator at the end of the will, *et cetera*.
>
> (2) Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses.

(3) The testator at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his will and testament.

(4) There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator.

That Section 654 of Mansfield's Digest provides that the court or officer that shall take proof of an acknowledgment of any deed, etc., "shall grant a certificate thereof and cause such certificate to be endorsed on said deed," etc. That Section 646 of Mansfield's Digest provides substantially that the act (relating to conveyances of real estate) should not be construed so as to embrace last wills and testaments.

Your petitioners, J. A. White and Annie White, show that they claim a fee simple title to said land, and your petitioner, S. H. Davis, shows that he claims an interest in said land by virtue of a mortgage thereon, and that each and all of such claims and rights arise under a statute of the United States, to-wit: Section 23 of the Act of Congress of April 26, 1906 (34 Stat. L. 137).

Your petitioners further show that the Supreme Court of the State of Oklahoma, in its opinion, held that Section 23 of the Act of Congress of April 26, 1906, required that the United States Commissioner place upon a will a certificate of acknowledgment and the fact of the actual acknowledgment of the said will by the testator before the United States Commissioner was not a compliance with the Act of Congress of April 26, 1906 (34 Stat. L. 137), and that by virtue of the invalidity of said will to convey title your petitioners were

decreed to have no right, title and interest in and to the land which was the subject of the action in that there was not upon the face of the will itself a certificate of acknowledgment, when in truth and in fact the Indian testator had acknowledged said will before the United States Commissioner, and that no rights accrued to the devisee under said will or those claiming under her.

Your petitioners further show that the question herein involved is of great importance in that if the opinion of the Supreme Court of the State of Oklahoma is allowed to stand, many titles other than the title of your petitioners will fail.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari may issue out of and under the seal of this Court directed to the Supreme Court of the State of Oklahoma, commanding said Court to certify and send to this Court on a day to be designated the full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Oklahoma had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court, as provided by law, and that the judgment of the Supreme Court of the State of Oklahoma may be reversed by this Honorable Court, and that your petitioners may have such other and further relief and remedy in the premises as to this Court may seem appropriate and in conformity with law, and your petitioners will ever pray.

S. H. DAVIS,
J. A. WHITE,
ANNIE WHITE,
By CHARLES J. KAPPLER,
I. R. McQUEEN,
C. B. KIDD,
Attorneys for Petitioners.

STATE OF OKLAHOMA,
Oklahoma County, ss:

C. B. Kidd, being first duly sworn, on his oath says that he is one of the attorneys for the petitioners in the above case; that he has read the foregoing petition and knows the contents thereof and that the allegations contained therein are true, as he verily believes.

C. B. KIDD.

Subscribed and sworn to before me this 27th day of March, 1925.

[SEAL.] INEZ MONTGOMERY,
Notary Public.

My commission expires August 4, 1927.

I hereby certify that I have examined the foregoing petition and in my opinion said petition is well founded in law.

CHARLES J. KAPPLER.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 992.

S. H. DAVIS, J. A. WHITE and ANNIE WHITE, *Petitioners,*

versus

ALICE WILLIFORD, ALLIE GRIFFIN, ROSIE WILLIFORD, MILLIE McLISH, and GEO. E. RIDER, *Respondents.*

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This Court, by this proceeding, is asked to construe an Act of Congress, viz: The Act of April 26, 1906 (34 Stat. L. 137), and more particularly the proviso of Section 23 of said Act, which reads as follows:

> "Every person of lawful age and sound mind may, by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a Judge of the United States Court for the Indian Territory, or a United States Commissioner."

The facts in this case are undisputed. Frazier McLish was a full-blood Chickasaw Indian and during his lifetime there was selected by him and allotted to him, as a portion of his

pro rata share of the lands of the Choctaw and Chickasaw Nations or Tribes of Indians, in the Indian Territory (now State of Oklahoma), certain lands. Frazier McLish died on the 10th day of February, 1907, and at the time of his death he was a resident of the Southern District of the Indian Territory. On the 9th day of July, 1906, Frazier McLish executed a will wherein he devised and bequeathed to his sister, Julia Kemp, all of his property, including the lands allotted to him as a member of the Chickasaw Nation. At the time of his death, he left surviving him his wife and three children and to each of them he bequeathed the sum of One ($1.00) Dollar. The record shows that on the 9th day of July, 1906, the date on which he executed the will, Frazier McLish did, in fact, appear before the Honorable Thomas N. Robnett, a United States Commissioner for the Southern District of the Indian Territory, and that the said testator did, in fact, acknowledge the instrument to be his last will and testament. There was endorsed on the will by the said Thomas N. Robnett the following: "Approved July 9, 1906, Thomas N. Robnett, U. S. Commissioner for the Southern District, Indian Territory, First Commissioner's District, in accordance with the Act of Congress of April 26, 1906. Seal."

Subsequent to his death, the devisee under the will, Julia Kemp, by warranty deed conveyed a portion of the land allotted to Frazier McLish, deceased, to J. A. White and on the 24th day of January, 1920, J. A. White, joined by his wife, Annie White, made, executed and delivered certain mortgages, to secure certain notes, conveying ninety (90) acres of the land which had been allotted to Frazier McLish, deceased, and it is through and by virtue of the will of the said

Frazier McLish that the petitioners herein claim title to the land in controversy.

This suit was originally instituted in the District Court of Love County, Oklahoma, by S. H. Davis, for the purpose of foreclosing a second mortgage which had been executed to him by the said J. A. White and Annie White. On the trial of this cause the issue was raised that the will was insufficient to pass title in that the will had not been acknowledged by the testator within the true meaning of the Act of Congress. At the trial of this cause the Honorable Thomas N. Robnett, who had been United States Commissioner at the time, appeared as a witness on behalf of these petitioners and testified that the testator did in fact appear before him on the 9th day of July, 1906, that being the date of his will, and that the testator did, in fact, acknowledge the document which he had signed to be his last will and testament. The trial court made findings in accordance with the testimony of the United States Commissioner, which findings were not disturbed on appeal to the Supreme Court of the State of Oklahoma. The Supreme Court of the State of Oklahoma, however, held that what was contemplated by the Act of Congress was that the United States Commissioner must, at the time he approved a will, place on such will itself a certificate of acknowledgment, and the fact of acknowledging the will itself by the testator, in the absence of a certificate of acknowledgment by the United States Commissioner, rendered the document wholly insufficient as a will and was not a compliance with the Act of Congress requiring that a will of a full-blood Indian, devising real estate, providing such will disinherits his wife or children, must be acknowledged before and approved by a

Judge of the United States District Court for the Indian Territory, or a United States Commissioner.

There is, therefore, but one question for determination, viz: The proper construction to be placed upon the Act of Congress providing that no will of a full-blood Indian, disinheriting a wife or children, should be valid unless acknowledged before and approved by certain designated officers. In other words, what did Congress mean when it required that such will be acknowledged? It is the contention of the respondents, who come within the designated class set forth in the proviso, that Congress intended that there be placed on the will itself a certificate of acknowledgment, such as was and is required, or is at least permissible, on deeds of conveyance, while it is the view of the petitioners herein that the intent of Congress was that the full-blood testator should appear before the designated Federal officer and, by some act or token or spoken word, acknowledge the document to be his last will and testament. The act of acknowledging a will had always been considered the well-recognized substitute for signing in the presence of witnesses and it was this character of acknowledgment which Congress contemplated and not, as was held by the Supreme Court of Oklahoma, that the United States Commissioner should place on the will itself some sort of a certificate of acknowledgment. If such had been the intent of Congress, it would undoubtedly have so provided by apt words.

It must be remembered that Congress was legislating in respect to wills and not to deeds of conveyance. The latter, in very early times, required a certificate of acknowledgment for two purposes, viz: that they might be filed for record, and

further that they might be read in evidence without further proof.

The Statute of Frauds, 29 Car. 11, C. 3, Sec. 18 (1677) provided that a will devising lands "shall be in writing and signed by the party so devising the same or by some other persons in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses or else they shall be utterly void and of none effect." All the statutes relating to wills enacted in England and in the several States in this country are based on this Statute of Frauds enacted in 1667. Of the requirement of the Statute of Frauds, 29 Car. 11, touching the attestation, the first point settled was that the witness need not see the testator sign. Soon after the statute was passed several of the judges maintained that there was not a sufficient attestation unless all the witness were present at the same time and saw the testator sign; but it was soon settled that inasmuch as the statute did not require the testator to sign in the presence of witnesses, it was enough if he acknowledged to them the will he had already signed.

Cook *vs.* Parsons (1701), Finch's Pres. Ch. 184;
Stonehouse *vs.* Evelyn (1734), 3 P. Wms. 252;
Grayson *vs.* Atkinson (1752), 2 Ves. Sr. 454.

It will be noted that the original Statute of Frauds did not specifically provide that the will might be acknowledged by the testator but, by a proper judicial construction, it was soon held that the acknowledgment was sufficient as a substitute for the signing in the presence of the witnesses. The result is that the statutes of practically all of the states permit, as a substitute for the signing in the presence of wit-

nesses, an acknowledgment by the testator, and this was the general statute relating to wills in force in the Indian Territory, wherein it was provided "such subscription shall be made by the testator in the presence of each of the attesting witnesses or shall be acknowledged by him to have been so made, to each of the attesting witnesses." An examination of the statutes of the several states and the construction placed thereon shows that even where an acknowledgment is not expressly allowed in lieu of the signing in the presence of the witnesses, the acknowledgment by the testator is held to be a sufficient compliance with the statute.

Woodruff *vs.* Hundley, 127 Ala. 640; 29 So. 98;
Sterling *vs.* Sterling, 64 N. D. 138;
Hall *vs.* Hall, 17 Pick. (Mass.) 373;
Cravens *vs.* Falconer, 28 Mo. 19;
Welch *vs.* Adams, 63 N. Ham. 344; 1 Atl. 1;
Raudebaugh *vs.* Shelley, 6 Ohio St. 307.

The cases we have cited and other cases which we might cite show that the word "acknowledgment" or "acknowledged" had a well-defined meaning in respect to wills at the time of the Congressional enactment under discussion and thereafter this well-defined meaning became a part of the statute.

It is a received canon of construction that where statutes have been adopted, the known and settled construction of those statutes has been construed as silently incorporated into the statute.

McDonald *vs.* Hobey, 110 U. S. 619; 4 Supr. Crt. Rep. 142;
Interstate Com. Com. *vs.* Baltimore & O. R. Co., 145 U. S. 263; 12 Supr. Crt. Rep. 844.

It may be conceded that a certificate by the officer before whom the full-blood Indian was required to appear would not have invalidated the will, but the adding of a certificate would have been mere surplusage.

Andrew C. Keely, Trustee *vs.* Jos. H. Moore, 196 U. S. 38; 26 Supr. Crt. Rep. 169.

Congress intended that the Indian testator appear before a particular designated Federal officer and acknowledge the will before him. Such officer might have placed on the will any sort of certificate he may have wished, however it was not the certificate of the officer which gave the will validity, but it was the acknowledgment by the Indian testator before such officer which gave the will validity. As has been pointed out, the purpose of a certificate of acknowledgment on an instrument is that the instrument may be recorded and read in evidence without further proof. This rule does not obtain in respect to wills in that a will is not necessarily recorded and the presence of a certificate of acknowledgment on a will or an attestation clause does not dispense with the necessity of producing at the trial, when a will is set up as a muniment of title or when it is offered for probate, all of the attesting witnesses, if they are available. It is customary, but never required, so far as we have found, for the attesting witnesses to sign what is commonly called an attestation clause, but we know of no statute in any state which makes such a clause a pre-requisite to the validity of the will itself.

Congress could have, but did not, require the will to be signed in the presence of the United States Commissioner, he being the designated attesting witness, but only required an *acknowledgment* before him. This acknowledgment was

an act of the testator and not an act of the United States Commissioner.

The Act of Congress seems to have contemplated that the will of a full-blood Indian testator, if he disinherits by such will a certain designated class of persons, should have been completed as a testamentary document, under the local laws, when the Indian in person presents it to the United States Commissioner. The Indian testator then, by some act, sign or spoken word, acknowledges the document or acknowledges his signature (whichever is contemplated) and then the United States Commissioner either approved or disapproved the instrument. In this case the testator acknowledged the instrument and acknowledged his signature and the United States Commissioner did approve the instrument and subscribed his name to it.

The question presented is one of importance in that titles other than that of the petitioners herein will necessarily fail if the opinion of the Supreme Court of the State of Oklahoma is permitted to stand as the law applicable.

Further argument and citation of authorities is not considered necessary here, but if this Honorable Court should grant this petition for certiorari, the questions involved will be fully and thoroughly presented by brief and argument when the case is regularly called.

Respectfully submitted,

CHARLES J. KAPPLER,
I. R. McQUEEN,
C. B. KIDD,
Attorneys for Petitioners.

[Endorsed:] In the United States Supreme Court, October term, 1924. S. H. Davis et al. plaintiff, vs. Alice Williford et al., defendants. Petition for Writ of Certiorari and Argument in Support Thereof. McQueen & Kidd, Attorneys at Law, 1009 Colcord Building, Attorneys for petitioner.

[Endorsed:] File No. 30957. Supreme Court U. S., October Term, 1924. Term No. 992. S. H. Davis et al., Plaintiffs in Error, vs. Alice Williford et al. Petition for Writ of Certiorari. Filed March 31, 1925.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 316

S. H. DAVIS, J. A. WHITE AND ANNIE WHITE
PLAINTIFFS IN ERROR,

vs.

ALICE WILLIFORD, ALLIE GRIFFIN, ROSIE WILLIFORD, MILLIE McLISH AND GEORGE E. RIDER, DEFENDANTS IN ERROR.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

CHARLES J. KAPPLER,
I. R. McQUEEN,
C. B. KIDD,
Counsel for Plaintiffs in Error.

Francis & Holden, Brief Printers, 206½ N. Broadway, Oklahoma City, M. 6245

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STATUTES CITED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 316.

S. H. DAVIS, J. A. WHITE AND ANNIE WHITE PLAINTIFFS IN ERROR,

vs.

ALICE WILLIFORD, ALLIE GRIFFIN, ROSIE WILLIFORD, MILLIE McLISH AND GEORGE E. RIDER, DEFENDANTS IN ERROR.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

This case is reported below in 106 Okla. 208. The style of the case below is *Williford* v. *Davis*.

The Supreme Court of Oklahoma, under date of October 7th, 1924 (R. 75), rendered a judgment reversing the judgment and decree of the trial court (R. 65-68).

Under the rules of the Supreme Court of Oklahoma, these plaintiffs in error, who were defendants in error in the Supreme Court of the State of Oklahoma, filed a

petition for rehearing (R. 83) and a brief in support thereof (R. 84), and on January 7th, 1925 (R. 94), an order was made by the Supreme Court of Oklahoma denying the petition for rehearing filed by these plaintiffs in error. An application to file a second petition for rehearing was denied March 5th, 1925 (R. 95).

A transcript of the complete record of the Supreme Court of Oklahoma, together with a petition for a writ of error (R. 1), assignments of error (R. 3), order allowing writ (R. 5), and writ of error (R. 6) was filed with the clerk of this Court on March 16th, 1925 (R. 95).

A petition for a writ of certiorari was filed by the plaintiffs in error, as petitioners, with the clerk of this Court on March 31st, 1925, and on June 1st, 1925, this Court ordered that action on the petition for a writ of certiorari be postponed until the hearing on the writ of error.

In the Supreme Court of Oklahoma, which is the highest court of that state in which a decision in the suit could be had, there was drawn in question the validity of a statute of the United States, namely, Section 23 of the Act of Congress of April 26th, 1906; 34 Stat. L. 137, and the decision was against the validity of such statute, or these plaintiffs in error claim certain

rights, titles and privileges under and by virtue of this statute of the United States (R. 75).

The statute of the United States, which is the basis of the claim of the plaintiffs in error, is the Act of Congress of April 26th, 1906; 34 Stat. L. 137. The title of the act reads as follows:

> "AN ACT TO PROVIDE FOR THE FINAL DISPOSITION OF THE AFFAIRS OF THE FIVE CIVILIZED TRIBES IN THE INDIAN TERRITORY AND FOR OTHER PURPOSES."

Section 23 of this act is the special congressional enactment on which these plaintiffs in error rely. This section is as follows:

> "Every person of lawful age and sound mind may, by last will and testament, devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse or children of such full-blood Indian, unless acknowledged before, and approved by, a judge of the United States Court for the Indian Territory or a United States Commissioner."

The claim advanced by these plaintiffs in error in the lower courts was that the true intent and meaning of the act relied upon was that the full-blood Indian testator, in order to disinherit his wife and children, should, in fact, acknowledge his will before and in the presence of either a judge of the United States Court

for the Indian Territory or a United States Commissioner, in which event, it would be a valid will, and upon the death of the testator would be sufficient to pass title to the allotted lands of the Indian.

The claim of the defendants in error is that the Act of Congress required the formal execution of a certificate of acknowledgment by one of the officers designated by Section 23 of the Act of Congress, and that such certificate of acknowledgment by the officer must appear on the face of the will itself.

The latter view was sustained by the Supreme Court of the State of Oklahoma (R. 75).

This cause is before this Court under the provisions of Section 237 of the Judicial Code as amended by Act of September 6, 1916, C. 448, 39 Stat. L. 726. Counsel for the plaintiffs in error were in doubt as to the proper method whereby the judgment and opinion of the Supreme Court of Oklahoma might be reviewed by this Court and come to this Court on a writ of error from the State Supreme Court. There was also filed in this Court a petition for a writ of certiorari.

The plaintiffs in error claim certain rights to lands, and this claim is based on what we conceive to be a proper construction of a Federal statute. The Supreme Court of Oklahoma based its opinion and judg-

ment upon a purely Federal question of substance, not heretofore determined by this Court, and the State Supreme Court decided the question presented in a way probably not in accord with the applicable principles of law.

Whether certiorari or writ of error was the proper method, in order to present this case for review by this Court, appeared to us a doubtful question, and hence both certiorari and writ of error were resorted to.

It appears that jurisdiction has been taken by this Court in determining somewhat similar questions, in some cases by certiorari and in other cases by a writ of error.

Blundell v. *Wallace*, decided March 2nd, 1925, 267 U. S. 373.
Grayson v. *Harris*, decided March 2nd, 1925, 267 U. S. 352.
Kenny v. *Miles*, 250 U. S. 58.

STATEMENT OF CASE

This action was originally brought in the District Court of Love County, State of Oklahoma, by S. H. Davis to foreclose a mortgage (R. 8), executed by J. A. White and Annie White, his wife, on ninety acres of land in Love County, State of Oklahoma. This land was a portion of the land allotted to Frazier McLish as a portion of his pro rata share of the lands of the

Choctaw and Chickasaw Nations or Tribes of Indians in the Indian Territory (now State of Oklahoma), (R. 34).

Frazier McLish was a full-blood Chickasaw Indian. The land was selected by him and allotted to him in his lifetime. He died on the 10th day of February, 1907 (R. 47), and at the date of his death was a resident of the Southern District of the Indian Territory (R. 47). On July 9th, 1906, Frazier McLish executed a will whereby he devised and bequeathed to his sister, Julia Kemp, all of his property, including the lands allotted to him as a member of the Chickasaw Nation (R. 47). On the date of his death he left surviving him as his heirs his wife, Millie McLish, and three children, Alice Williford, Allie Griffin and Rosie Williford (R. 31), and to each of them he bequeathed the sum of one dollar ($1.00).

Julia Kemp, the devisee under his will, under date of November 15th, 1907 (R. 62), conveyed by a warranty deed the land which is the subject matter of this action to J. A. White. J. A. White went into possession on January 1st, 1909 (R. 64).

The plaintiffs in error claim the title under the will of Frazier McLish, while the defendants in error claim title as heirs at law of Frazier McLish, deceased, ex-

cept the defendant in error, George E. Rider, who claims an interest in the land under a duly approved contract (R. 36) with his co-defendants in error.

The will of Frazier McLish is as follows:

"I, Frazier McLish, being of lawful age, and sound mind and disposing memory, do declare this to be my last will and testament; hereby revoking all others heretofore made by me at any time.

"First. I hereby nominate and appoint Roberson Kemp of Emit, I. T., to be the sole executor of this, my last will and testament.

"Second. My will is that all just debts and funeral expenses be paid out of any of my estate, either real or personal, by my said executor.

"Third. I hereby give and bequeath to my wife, Millie McLish, one dollar; to my daughter, Alice McLish, one dollar; to my daughter, Allie McLish, one dollar, and to my daughter, Ruthie McLish, one dollar.

"Fourth. After my debts and funeral expenses and the bequests given to my wife and children are all fully paid and discharged, I give, devise and bequeath unto my sister, Julia Kemp, all my property of every kind, and both real and personal, including all of my allotment in the Choctaw and Chickasaw Nations, which has now been taken in allotment by me and which may be taken in allotment for me after my death, and all moneys which are due me and may hereafter be due me from the United States or from the Choctaw and Chickasaw Nations as a member of the Chickasaw Tribe of Indians.

"In testimony whereof, I have hereunto set my hand and seal and do declare and publish this as my last will and testament this 9th day of July, 1906.

"Frazier McLish.

"We, James A. Cotner, George Cotner and W. Wade, have hereunto subscribed our names as witnesses to the above and foregoing last will and testament of Frazier McLish, at the request of the said Frazier McLish, and in his presence and in the presence of each other, on this 9th day of July, 1906.

"James A. Cotner.
"George Cotner.
"W. Wade.

"Approved by me July 9, 1906. Thomas N. Robnett, U. S. Commissioner for the Southern District, Indian Territory, First Commissioner's District, in accordance with the Act of Congress of April 26, 1906 (Seal)" (R. 22-47).

This will was admitted to probate in the United States Court for the Southern District of the Indian Territory on April 16, 1907 (R. 50), and letters testamentary were issued to the executor named in the will (R. 52).

The will was approved by the Honorable Thomas N. Robnett, United States Commissioner for the Southern District of the Indian Territory, on July 9, 1906, as evidenced by the endorsement of the United States Commissioner at the end of the will and following the attestation clause subscribed by the attesting witnesses (R. 22-47).

The will did not have on its face a formal certificate of acknowledgment executed by the United States Com-

missioner, but at the trial of this cause in the trial court, these plaintiffs in error produced as a witness on their behalf, the Honorable Thomas N. Robnett, who testified that on July 9, 1906, he was a United States Commissioner for the Southern District of the Indian Territory; that the testator, together with two of the attesting witnesses, brought the document to him on that day; that he talked the matter over with the testator, asked him if he understood it and the effect of it, and that the testator then acknowledged the document to be his will (R. 55, 56, 57, 58).

The trial court found that the testator had, in fact, acknowledged the will before the United States Commissioner, as shown by the findings of the trial court, as follows:

"The court further finds that the said will of Frazier McLish was acknowledged before, and approved by, the Honorable Thomas N. Robnett, United States Commissioner for the Southern District of Indian Territory, on the 9th day of July, 1906, and that said approval is in all respects as required by the Act of Congress, and said will is legal and valid and passed all of the right, title and interest of the said devisor in and to said premises to the said Julia Kemp" (R. 70).

The State Supreme Court did not disturb these findings of fact made by the trial court, but based its opinion on the theory that Section 23 of the Act of Congress required the execution of a formal certificate of ac-

knowledgment by the United States Commissioner, and that this certificate must appear on the face of the will itself.

ASSIGNMENTS OF ERROR.

It is contended by the plaintiffs in error that the Supreme Court of Oklahoma erred in its judgment and opinion as follows:

I. That the Supreme Court of the State of Oklahoma erred in holding and deciding that a certificate of acknowledgment was essential to the validity of a will of a full-blood Indian testator, devising any part of his real estate to the exclusion of his wife and children (R. 4).

II. That the Supreme Court of the State of Oklahoma erred in holding and deciding that the testimony of the said Honorable Thomas N. Robnett, United States Commissioner at the time such will was in fact acknowledged, in the trial of this cause in the District Court of Love County, State of Oklahoma, was not a sufficient compliance with Section 23 of the Act of Congress of April 26, 1906, 34 Stat. L. 137 (R. 4).

III. That the Supreme Court of the State of Oklahoma erred in holding that the purported devise by the said Frazier McLish, deceased, to his sister, Julia

Kemp, was invalid and void and passed no title to the land sought to be foreclosed, in the action instituted in the District Court of Love County, Oklahoma (R. 4).

Inasmuch as each assignment of error relates to the same subject matter, each will be presented in this brief under one argument.

ARGUMENT.

Briefly stated, it is claimed by the plaintiffs in error that the proper construction of Section 23 of the Act of Congress of April 26, 1906, 34 Stat. L. 137, as related to the will of a full-blood Chickasaw Indian whereby he devises his lands to the exclusion of his wife and children, is that the Indian testator appear before the United States Commissioner and by some act, sign or spoken word, acknowledge the document presented, to be his will, and it is the fact of such acknowledgment by said testator, and not any certificate by the officer, which gives validity to the will; at least, such acts or conduct by the testator are a compliance with the statutory requirement. If our view is correct, the plaintiffs in error should prevail. If, on the other hand, Congress intended to require that a certificate of acknowledgment be placed on the will itself by the officer, then concededly, plaintiffs in error cannot prevail.

It is necessary to consider the state of the law as

it existed in the Indian Territory in respect to the right of an Indian to make a will devising lands at the time of the congressional enactment, under which we claim title.

Under the Act of Congress of April 28th, 1904, C. 1824, Sec. 2, 33 Stat. L. 573, it was provided, among other things, as follows:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen or otherwise."

The Arkansas law of wills was a part of the law that had thus been adopted and put in force in the Indian Territory before 1904 (Section 31 of the Act of Congress of May 2nd, 1890, 26 Stat. L. 81).

The Act of Congress of April 28th, 1904, C. 1824, Sec. 2, 33 Stat. L. 573, enabled an Indian in the Indian Territory to devise all his alienable property by will made in accordance with the laws of the State of Arkansas, but this act did not operate to remove any of the restrictions theretofore placed on the lands of the Indian by the Act of Congress. This was the holding

of this Court in the case of *Taylor* v. *Parker*, 235 U. S. 42. In that case, an Indian allottee made a will on March 22, 1905, and died on March 25th, 1905. She devised to her husband her allotment to the exclusion of her heirs. This Court held that at that time her allotted land was restricted under the Supplemental Agreement with the Choctaw and Chickasaw Nations, ratified by the Act of Congress of July 1st, 1902, 32 Stat. L. 641, C. 1362, and that this restriction upon alienation extended to a devise by will, but further held that the extension of the laws of Arkansas, theretofore put in force in the Indian Territory, enabled an Indian in the Indian Territory to devise all of his alienable property by will, made in accordance with the laws of the State of Arkansas, but did not operate to remove any of the restrictions on alienation by Indian allottees theretofore made by congressional legislation.

It was only by virtue of Section 23 of the Act of Congress of April 26th, 1906, that an Indian could alienate his real estate by will. By Section 23 the Indian was given the right to dispose of all his estate, real and personal, by will. This was a right he had not theretofore had. There was, however, in Section 23 the proviso in respect to the will of a full-blood Indian devising real estate, namely:

"That no will of a full-blood Indian devising real

estate shall be valid if such last will and testament disinherits the parent, wife, spouse or children of such full-blood Indian, unless acknowledged before, and approved by, a judge of the United States Court for the Indian Territory or a United States Commissioner."

(Proviso to Sec. 23 of the Act of Congress of April 26, 1906, 34 Stat. L. 137.)

The will of any Indian, regardless of the degree of blood, devising real estate must, by virtue of the provisions of the Act of Congress of April 28th, 1904, C. 1824—Sec. 2, 33 Stat. L. 573, comply with the laws of the State of Arkansas, theretofore adopted in the Indian Territory, in respect to form, execution, mode and manner of attestation and acknowledgment.

The will of a full-blood Indian, however, in addition to the requirements which effected, and which were applicable to all Indians, must be acknowledged before one of the designated officers.

It appears that Congress contemplated that the will of a full-blood Indian be completed under the local law applicable, as a testamentary document, and in addition to the requirements of the local law, or in conjunction with it, the Indian testator should appear before either designated officer and acknowledge the document he had executed to be his will.

That the local law, in respect to wills and descents, is

applicable is the effect of the holding of this Court in the case of *Blundell* v. *Wallace*, decided March 2nd, 1925, 267 U. S. 373, 45 Sup. Ct. Rep. 247. In that case the Indian testatrix died in 1912. She bequeathed her entire allotment to her great grand daughters to the exclusion of her husband. The defendant in error in that case asserted title through *mesne* conveyances from the surviving husband of the testatrix. The question before this Court was the effect of Section 11,224, Compiled Statutes of Oklahoma 1921, which reads as follows:

> "Every estate and interest in real or personal property, to which heirs, husband, widow or next of kind might succeed, may be disposed of by will; provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, *nor shall any woman while married bequeath more than two-thirds of her property away from her husband;* provided, further, that no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath same by will" (italics are in this Court's opinion).

The plaintiffs in error in that case contended that this statute, as applied to the will of the Indian testatrix, was in direct conflict with Section 23 of the Act of Congress of April 26th, 1906, which is the statute now before the Court for construction.

This Court said, in passing on the contention, that the state statute was in conflict with Section 23:

> "A brief reference to the state of the law at the time of the passage of Section 23 will help to clear the way for a correct determination of the question. By Sections 12 and 16 of the Supplemental Agreement with the Choctaws and Chickasaws, ratified by the Act of July 1, 1902, *supra*, lands of the kind here involved were declared to be inalienable during specified periods of time. It is settled that this restriction against alienation extended to a disposition by will, *Taylor* v. *Parker*, 235 U. S. 42, 35 S. Ct. 22, 59 L. ed. 121; and, but for section 23, it is plain that the devise in question, at least as to the homestead, would have been without effect.
>
> "But, it must be borne in mind, the restriction was in respect of the specified lands and did not affect the testamentary power of the Indians to dispose of their alienable property, which power, on the contrary, has been fully recognized, first, by an extension of the appropriate laws of Arkansas over the Indian Territory, and then, upon the admission of the State of Oklahoma, by the substitution therefor of Oklahoma law. *Taylor* v. *Parker*, *supra*; *Jefferson* v. *Fink*, 247 U. S. 288, 294, 38 S. Ct. 516, 62 L. ed. 1117. The general policy of Congress, prior to the adoption of Section 23, plainly had been to consider the local law of descents and wills applicable to the persons and estates of Indians except insofar as it was otherwise provided. Thus, by Section 2 of the Act of April 28, 1904, C. 1824, 33 Stat. 573, the laws of Arkansas, theretofore put in force in the Indian Territory, were expressly 'continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen or otherwise,' and juris-

diction was conferred upon the courts of the territory in the settlement of the estates of decedents, etc., whether Indian, freedmen or otherwise.

"Section 23 must be read in the light of this policy; and, so reading it, we agree with the ruling of the state supreme court that Congress intended thereby to enable 'the Indian to dispose of his estate on the same footing as any other citizen, with the limitation contained in the proviso thereto'. The effect of Section 23 was to remove a restriction theretofore existing upon the testamentary power of the Indians, leaving the regulatory local law free to operate as in the case of other persons and property."

In determining, therefore, the intent of Congress at the time of the adoption of Section 23 in respect to the use of the word "acknowledged," as set forth in the proviso, reference should properly be had to the regulatory local law as well as to the well recognized meaning of the word "acknowledged" in respect to wills, which had been construed by the courts, both in England and in this country, since the Statute of Frauds enacted by the English Parliament in 1677, 29 Car. II, C. 3, Sec. 5.

The regulatory local law, in respect to wills, was the law of Arkansas theretofore put in force in the Indian Territory. The applicable provisions relating to wills is set forth in Chapter 155 of Mansfield's Digest of the Statutes of Arkansas, being the laws of Arkan-

sas as published in 1884 (Act of Congress, May 2, 1890, 26 Stat. L. 81, Section 31). The applicable statutes are as follows:

> "Sec. 6492. Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:
>
> "First: It must be subscribed by the testator at the end of the will, or by some person for him, at his request.
>
> "Second: Such subscription shall be made by the testator in the presence of each of the attesting witness, or shall be acknowledged by him to have been so made to each of the attesting witnesses.
>
> "Third: The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his will and testament.
>
> "Fourth: There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator."

These sections of the statute are set forth to show the applicable local law and more particularly to show the state of the law as set forth in subdivisions second and third of Section 6492, wherein it is provided that in the event the testator does not sign the will in the presence of the attesting witnesses there is a provision that the subscription shall be "acknowledged" to each of the attesting witnesses.

There was also in force in the Indian Territory, Chapter 27 of Mansfield's Digest, relating to Conveyances of Real Estate. The applicable provisions of this chapter are as follows:

"Sec. 646. This act shall not be construed so as to embrace last wills and testaments.

* * * * * * *

"Sec. 654. Every court or officer that shall take the proof or acknowledgment of any deed or conveyance of real estate, or the relinquishment of dower of any married woman in any conveyance of the real estate of her husband, shall grant a certificate thereof and cause such certificate to be indorsed on said deed, instrument, conveyance or relinquishment of dower, which certificate shall be signed by the clerk of the court where probate is taken in court, or by the officer before whom the same is taken and sealed, if he have a seal of office.

* * * * * * *

"Sec. 664. Every deed or instrument in writing, conveying or affecting real estate which shall be acknowledged or proved and certified, as prescribed by this act, may, together with the certificate of acknowledgment, proof or relinquishment of dower, be recorded by the recorder of the county where such land to be conveyed or affected thereby shall be situate, and when so recorded may be read in evidence without further proof of execution."

This chapter was adopted and put in force in the Indian Territory under the Act of Congress of February 19th, 1903, 32 Stat. L. 841.

These sections of the local law are set forth partic-

ularly to show the distinction existing at that time in the Indian Territory between the acknowledgment of a will and the certificate of acknowledgment required, or at least permitted, on deeds of conveyance.

The State Supreme Court seems to have failed to distinguish between the certificate of acknowledgment required, or at least permitted, to be placed on a deed of conveyance and the well recognized rule in respect to wills, whereby, in the event the witness did not see the testator sign his will it was sufficient that the testator acknowledge the will, or the signature, in the presence of the witness.

This "acknowledgment" by the testator had at the time of the congressional enactment, as set forth in Section 23, become a well recognized substitute for signing in the prescence of the witnesses. This had become a rule of substantive law, not only in the Indian Territory, but in the several states of the United States and in England, subsequent to the enactment of the Statute of Frauds.

We think it clear that Congress, in legislating in respect to the will of a full-blood Indian, as an additional precaution against the perpetuation of any fraud, or the taking of any undue advantage, intended that the testator come before a certain designated officer and ac-

knowledge the document as his will, and it thereby became the duty of the officer in whom Congress had placed confidence to either approve a will or disapprove it.

Congress also contemplated that there should be some act on the part of the Indian testator, and this act was his acknowledgment or statement or some act or sign to indicate to the officer that the document was his will, while the act of approval was that of the officer.

The regulatory local law, as we have shown, clearly distinguished between a certificate of acknowledgment which might be placed on a deed of conveyance and the "acknowledgment" which related to the due and proper execution and attestation of wills. The former required a certificate by the officer, the latter did not.

It will be noted that Section 23 does not purport to supersede the applicable local law in any respect so far as the form, mode and manner of execution, attestation or acknowledgment of the will of an Indian testator was concerned. The local law, therefore, was the law applicable to such matters.

Blundell v. *Wallace*, decided March 2nd, 1925, 267 U. S. 373, 45 Sup. Ct. Rep. 247.
U. S. v. *Fox*, 94 U. S. 315.

The applicable local law also specifically provided that the chapter on conveyances, which was in force in the Indian Territory, should—

"not be construed so as to embrace last wills and testaments."

(Sec. 646, Chapter 27, Mansfield's Digest, *supra*).

But, regardless of the local law which was applicable to all wills, the word "acknowledged" in respect to wills had received a well recognized construction since the first English Statute of Frauds, enacted by the English Parliament in 1677, 29 Car. II, C. 3, Sec. 5. The applicable provision is as follows:

"And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June all devises and bequests of any lands or tenements, devisable either by force of the statute of wills or by this statute or by force of the custom of Kent or the custom of any borough or any other particular custom, shall be in writing and signed by the party so devising the same or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses or else they shall be utterly void and of none effect."

All of the statutes relating to wills enacted in England or in this country are based on the original Statute of Frauds, enacted in the year 1677. Under this statute a will, among other things, shall be:

"Attested and subscribed in the presence of the said devisor by three or four credible witnesses.

"Of the requirement of the Statute of Frauds,

29 Car. II, touching the attestation, the first point settled was that the witnesses need not see the testator sign. Soon after the statute was passed several judges maintained that there was not a sufficient attestation unless all the witnesses were present at the same time and saw the testator sign; but it was soon settled that inasmuch as the statute did not require the testator to sign in the presence of the witnesses, it was enough that he acknowledged to them the will he had already signed."

Rood on Wills, Section 273.

The author above quoted cites cases to which we do not have access, hence we cannot verify the citations. Citing:

Cook v. *Parsons* (1701), Finch's Prec., Ch. 184.
Stonehouse v. *Evelyn* (1734), 3 P. Wms. 252.
Grayson v. *Atkinson* (1752), 2 Ves. Sr. 454.
Ellis v. *Smith* (1754), 1 Ves. Jr. 11.

It will be noted that the original Statute of Frauds did not specifically provide that the will might be acknowledged by the testator, but it was soon held that the acknowledgment was sufficient as a substitute for signing in the presence of the witnesses.

Rood on Wills, Sec. 273.

It will be noted that the statute in force in the Indian Territory, relating to wills, expressly allowed the subscription of the testator to:

"Be acknowledged by him to have been so made to each of the attesting witnesses."

(Subdivision 2, Sec. 6492, Mansfield's Digest.)

Regardless of the fact that according to the statutes of some states, subsequent acknowledgment is not specifically allowed as a substitute for signing in the presence of witnesses, such acknowledgment is held to be sufficient.

Woodruff v. *Hundley*, 127 Ala. 640.
Stirling v. *Stirling*, 64 Ind. 138.
Hall v. *Hall*, 17 Pick. (34 Mass.) 373.
Cravens v. *Falconer*, 28 Mo. 19.
Welch v. *Adams*, 63 N. Ham. 344.
Raudebaugh v. *Shelly*, 6 Ohio St. 307.

These cases show that the word "acknowledgment" and "acknowledged" had a well defined meaning at the time of the enactment of Section 23; and, therefore, this well defined meaning became a part of the statute.

McDonald v. *Hovey*, 110 U. S. 619.
Interstate Com. Co. v. *Baltimore & O. R. Co.*, 145 U. S. 263.

In view, then, of the previous statutory provisions providing for acknowledgment of wills, and the judicial construction placed thereon by the courts, it seems improbable to suppose that Congress intended that the United States Commissioner must place on the will itself a certificate of acknowledgment, as was the holding

of the lower court. It would appear to be as reasonable to say that all legislative provisions relating to the acknowledgment of wills as a substitute for signing in the presence of the witnesses, required a certificate of the attesting witnesses, as to say that the acknowledgment provided for in the Act of Congress required that a certificate be added to the will itself. It is customary, but, so far as we know, never required, for the attesting witnesses to sign what is known as an attestation clause, but we know of no statute in any state which makes such a clause a prerequisite to the validity of the will.

The law relating to wills in force in the Indian Territory did not require a certificate by the attesting witnesses and had a certificate been placed thereon it would have been mere surplusage. *Keely, Trustee,* v. *Moore,* 196 U. S. 38. A certificate was required only on deeds of conveyances to the end that they might be recorded and then—

"read in evidence without further proof."

(Sec. 664, Mansfield's Digest.)

The various states of the Union have statutes which require forms of acknowledgment for deeds and specify the officers who may take the acknowledgment and designate what the certificate of acknowledgment may con-

tain, but this is for an entirely different purpose than that contemplated by the Act of Congress under consideration.

These statutes are quite different from the requirement of the Act of Congress giving no form, but simply requiring that the Indian should appear before the proper officer and acknowledge the document as his will. It would seem more consistent with the purpose of the act to so construe it, not that certain certificates should be endorsed on the will by the officer, but that the Indian be required to come in person before the commissioner and acknowledge the document and request the approval of the commissioner, all of which was done in this case.

It seems clear that if Congress had intended that the officer place on the will itself a certificate of acknowledgment such intention would have definitely been made to appear by the use of apt words.

It will be readily conceded that a certificate of acknowledgment placed on the will itself by the United States Commissioner would not have vitiated the effect of the document as a will. It might serve the purpose of an attestation clause, which is usual but not required. A certificate of acknowledgment would, as we view the case, have been altogether superfluous. We quote from Schouler on Wills, 6th ed., Vol. 1, Sec. 554:

"The certificate of acknowledgment usual in deeds is altogether superfluous in a will; but it may have the usual effect, provided all other formalities are consistent, of converting the notary or magistrate himself into one of the subscribing witnesses. A clerk of a court who witnesses a will does not affect its validity by attaching his official seal and certificate; at the same time he should have dispensed with it."

The following authorities support the text:

Payne v. *Payne*, 54 Ark. 415, 16 S. W. 1.
Franks v. *Chapman*, 64 Texas 159.

As a further aid in determining the Congressional intent in the use of the word "acknowledged" in the proviso of Section 23, resort should properly be had to the character of proof required to prove the proper execution and attestation of a will when presented either for probate or as a muniment of title.

The following sections of Chapter 155 of Mansfields Digest were in force when the Act of Congress was approved (Section 31 of the Act of Congress of May 2, 1890, 26 Stat. L. 81):

"Sec. 6515. When one of the witnesses to such will shall be examined, and the other witnesses are dead, insane, or their residence unknown, then such proof shall be taken of the handwriting of the testator, and of the witnesses dead, insane or absent, and of such other circumstances as would be sufficient to prove such will on a trial at common law.

"Sec. 6516. If it shall appear to the satisfaction of the court or clerk that all the subscribing wit-

> nesses to the will are dead, insane or absent, the court or clerk shall take and receive such proof of the handwriting of the testator and subscribing witnesses to the will, and of such other facts and circumstances as would be sufficient to prove such will in a trial at law."

These sections of the applicable local law are set forth primarily to show that under the local law it was not contemplated that any certificate of any of the attesting witnesses would, in itself, be sufficient to prove the document as a will, but it was required that the attesting witnesses, if available, be produced as witnesses, giving to all parties the right to cross examine, and in the event of inability to produce one or all of the subscribing witnesses at the trial, then it was provided that the will might be probated by the evidence of such facts and circumstances

> "as would be sufficient to prove such will on a trial at common law."

(Section 6515, Mansfield's Digest, *supra*).

The proof required in order to establish what the testator did and in order to establish the will as a devise of real property was not interfered with by any Congressional enactment, and it is not probable to suppose that Congress contemplated that a certificate of the officer would, in the face of the rules of evidence then in force, be sufficient to establish the fact of such acknowledgment.

This will was duly admitted to probate in the United States Court for the Southern District of the Indian Territory, and but for the probable binding effect of a question of procedure under the local law as determined by the State Supreme Court in the case of *Armstrong* v. *Letty*, 85 Okla. 205, the order of the United States Court for the Southern District of the Indian Territory in admitting the will to probate would have determined the fact of the proper acknowledgment of the will under the Act of Congress.

The effect of the decision in the case of *Armstrong* v. *Letty*, *supra*, was that the judgment admitting the will to probate would not conclude an heir of a full-blood Indian from attacking the fact of such approval and acknowledgment in a proceeding brought in which the will was set up as a muniment of title. The effect of the holding of the State court in that case was that the judgment of the court admitting the will to probate merely had the effect of determining that it had been executed in accordance with the requirements of the local law and did not determine the validity of the will as a conveyance of restricted Indian land. The particular acknowledgment and approval, as provided by Section 23 of the Act of Congress, was, therefore, reserved for determination when the will of the full-blood testator was offered in evidence in a suit involving the title to lands devised by such full-blood Indian.

However, it certainly was not contemplated by Congress that the precautionary rules of evidence applicable to the proving of the acknowledgment of wills, whereby it was provided that the witnesses themselves, if available, should be personally present on the trial of the cause and be subjected to cross examination, should be abrogated, and that there should be substituted therefor a rule that a certificate of acknowledgment should be sufficient in lieu of the personal presence of the person of the officer before whom the will was acknowledged if his personal presence was available. It seems clear that if such a sweeping change was contemplated Congress would have definitely so stated.

Congress knew that an acknowledgment to a deed could be proved by the certificate of the officer, but, on the other hand, Congress also knew that a will took effect only upon the death of the testator, and that the statutes in force in the Indian Territory at the time of the Congressional enactment required a much higher degree of proof to establish a will and to establish the acknowledgment thereto than was required of a deed of conveyance duly acknowledged and certified.

It need not be decided that the testimony of the United States Commissioner is the only method by which the "acknowledgment" provided for by the Act

of Congress may be proven, but certainly the testimony of the Commissioner himself was the best character of evidence obtainable and was, at least, a permissible form of proof. Congress, nowhere, evidences an intent to change this rule of evidence. Congress could easily have said that a certificate of acknowledgment executed by a United States Commisisoner would be sufficient evidence of the fact of such acknowledgment, but this Congress did not do, and this shows the absence of any intent on the part of Congress to change the law of evidence in respect to the character of proof required to prove the acknowledgment to a will.

It is true that the word "acknowledged" in statutes requiring that a will be acknowledged is the same word as that employed in statutes requiring that a deed be "acknowledged," but the sense in which the word is used is quite different. The former is employed in the sense of an acknowledgment in fact, and the latter is employed in the sense of a certificate of acknowledgment.

The obvious intent of Congress was to prevent fraud when it required that the will of a full-blood Indian be acknowledged before certain designated officers, but it would appear that if the opinion of the lower court is the law applicable, it may have the effect of opening the

door to fraud. The proper inference to be drawn from the opinion of the court below is that a will may be introduced in evidence without further proof of its acknowledgment, if it bears a certificate of acknowledgment.

At the trial of this cause the United States Commissioner did testify that the testator did acknowledge the instrument to be his will. Under the rules of evidence, if his personal presence was obtainable, he was an indispensable witness. He could have placed on the will itself any form of acknowledgment, but it would have been the bounden duty of the trial court to declare the will invalid as a devise of restricted Indian land, if this particular witness had not been produced or his absence accounted for, in which event secondary evidence of such acknowledgment would probably have been competent.

It is respectfully submitted that under the facts as they appear in this record, and under the law applicable to this case, the decision and judgment of the Supreme Court of Oklahoma should be reversed.

Respectfully submitted,

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C. B. KIDD,
Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

No. 316.—October Term, 1925.

S. H. Davis, J. A. White, and Annie White, Plaintiffs in Error, *vs.* Alice Williford, Allie Griffin, Rosie Williford, et al.	In Error to the Supreme Court of the State of Oklahoma.

[June 1, 1926.]

Mr. Justice Sanford delivered the opinion of the Court.

This case involves a single question relating to the construction and effect of § 23 of the Act of April 26, 1906, c. 1876,[1] dealing with the Five Civilized Tribes. This reads: "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner."

The subject-matter of the controversy—which arose in the course of a proceeding instituted in a local court of Oklahoma to foreclose a mortgage—is a part of a surplus allotment of 160 acres out of tribal lands made in 1904 to Frazier McLish, a full-blood Chickasaw Indian and held by him subject to restrictions against alienation. In July, 1906, he executed a will by which he bequeathed one dollar to his wife and each of his children, and devised all the residue of his property, including this allotment, to his sister. In 1907, McLish having died, the will was probated and recorded, the only endorsement which it bore being the following: "Approved by me July 9, 1906. Thomas N. Robnett, U. S. Commissioner for the Southern District, Indian Territory, First

[1] 34 Stat. 137, 145.

Commissioner's District, in accordance with the Act of Congress of April 26, 1906. (Seal)."

For present purposes it suffices to say that the proceeding in the district court involved a controversy as to the title to part of this allotment, arising between J. A. White, to whom it had been conveyed by the devisee, and S. H. Davis, to whom White had given a mortgage, on the one side; and the widow and children of the testator, on the other side. White and Davis claimed that the will was valid and had passed title to the devisee: and the widow and children claimed that it was invalid, since it had not been acknowledged before a commissioner or judge as required by the Act of 1906, and that the title to the allotment had descended to them.

On the trial the United States Commissioner testified that at the time he approved the will, the testator had appeared before him and acknowledged its execution for the purposes therein mentioned, but that, by inadvertence, the certificate of such acknowledgment had been omitted. The court, in view of this evidence, held that as the will had been in fact acknowledged before the Commissioner, it was valid and vested title to the allotment in the devisee; and gave judgment accordingly. On appeal, this was reversed by the Supreme Court of Oklahoma, which held that parol testimony was inadmissible to supply the lack of a certificate of acknowledgment, and that under the Act of 1906 the will was invalid. 106 Okla. 208.

The case is now before us on a writ of error, which was allowed in March, 1925, and a petition for a writ of certiorari, which was postponed to the hearing on the merits. The writ of error must be dismissed under the Jurisdictional Act of 1916; and the writ of certiorari is granted.

Davis and White do not deny that the will disinherited the testator's wife and children. *Re Byford's Will*, 65 Okla. 159, 162, and that it was invalid unless acknowledged before the Commissioner, as well as approved by him. Their contention is, that under a proper construction of § 23 of the Act of 1906, where a full-blood Indian who devises his lands to the exclusion of his wife and children, appears before a Commissioner and acknowledges the document presented to be his will, "it is the fact of such acknowledgment by said testator, and not any cer-

tificate by the officer, which gives validity to the will''; and they expressly concede that ''if, on the other hand, Congress intended to require that a certificate of acknowledgment be placed on the will itself by the officer'', they cannot prevail.

Construing § 23 of the Act in the light of its manifest purpose, we think that Congress intended that to give validity to such a will it was necessary not only that it be in fact acknowledged by the testator before the officer, but that the officer place a certificate of such acknowledgment upon the will, as an essential part of the acknowledgment itself.

Prior to the Act of 1906, Indians of the Five Civilized Tribes had no power to dispose of their restricted lands by will. *Taylor* v. *Parker*, 235 U. S. 42, 44; *Blundell* v. *Wallace*, 267 U. S. 373, 374. And in giving them generally such power by § 23 of the Act, it was specifically provided that no will of a full-blood Indian devising real estate and disinheriting his parent, spouse or children, should be valid ''unless acknowledged before and approved by a judge of a United States court . . . or a United States Commissioner.''

It is clear that it was intended by this proviso to prevent a full-blood Indian from being overreached and imposed upon, and induced for an inadequate consideration or by trickery, to deprive his heirs of their inheritance; and that, to this end, a will devising his land to other persons should not be valid unless acknowledged before and approved by a judicial or quasi-judicial officer of the United States. To make certain of this, the officer was not to approve the will unless the testator appeared before him in person and acknowledged its due execution, and, upon the examination of the testator, the will appeared to be of such a character and based upon such consideration as to warrant its approval. Plainly, it was not intended that such acknowledgment and approval should be a perfunctory matter. And as the will when probated and recorded would be a muniment of title to the land, necessarily a certificate both of the acknowledgment and the approval should appear upon it. We cannot think that Congress intended that in a matter of this solemnity and importance, involving the recorded title to land, the effect of a will, which when probated and recorded bore no certificate of the acknowledgment or approval essential to its validity, should there-

after rest in parol, subject to all the uncertainty that would follow if its validity could be established—when the lips of the testator were closed—by parol evidence as to the fact of acknowledgment or approval. This would destroy the certainty which is essential in muniments of title appearing upon the public records. If this were possible, the subsequent establishment of the validity of the will would largely depend upon the lapse of time before it was brought into litigation, and the availability, at that time, of evidence to establish or to contradict a claim that it had in fact been acknowledged or approved; and where portions of the land had been conveyed by the devisee to different persons, the result of suits involving the validity of the will, might often depend upon the weight attached by the courts to diverse evidence in different suits, and lead to judgments establishing the validity of the will as to the purchaser of one portion of the land, and its invalidity as against another.

Clearly, we think, Congress did not contemplate such a disastrous result, but in granting by the Act to a full-blood Indian, under its guardianship, the power to dispose of his restricted land by will, intended that a will disinheriting those to whom his land would otherwise descend, should be valid only when the facts of acknowledgment and approval should both be certified by the officer on the will, and appear upon it when probated and placed of record.

We conclude here that the will, by reason of the lack of any certificate of acknowledgment, was not "acknowledged before" the Commissioner within the meaning of the Act, and, being therefore invalid, did not pass title to the allotment to the devisee. The judgment is accordingly

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.